Fordham Law Review

Volume 81 | Issue 4 Article 8

2013

# Avoiding Double Recovery: Assessing Liquidated Damages in Private Wage and Hour Actions Under the Fair Labor Standards Act and the New York Labor Law

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# NOTES

# AVOIDING DOUBLE RECOVERY: ASSESSING LIQUIDATED DAMAGES IN PRIVATE WAGE AND HOUR ACTIONS UNDER THE FAIR LABOR STANDARDS ACT AND THE NEW YORK LABOR LAW

*Alexander J. Callen**

*Wage and hour cases are common in New York, yet courts calculate damages inconsistently when plaintiffs pursue their unpaid wages under both federal and state law. Overlapping provisions of the Fair Labor Standards Act and the New York Labor Law both authorize private actions for the recovery of certain unpaid wages, and each also provides an additional 100 percent of the unpaid wages as liquidated damages unless the employer establishes a good-faith defense. Given these similarities, New York wage and hour cases regularly flirt with the double recovery doctrine, which prevents plaintiffs from receiving duplicative awards.*

*Historically, courts in the Second Circuit have been split over whether awarding both sets of liquidated damages offends double recovery. An old New York statute authorized only 25 percent of the unpaid wages as liquidated damages and allowed them only if an employee could demonstrate that the employer's violation was willful. Based upon the old law's scienter requirement and upon its legislative history, courts considered the state provision punitive in purpose, as opposed to the federal provision, which is compensatory. Consequently, some courts reasoned that because each provision served a different purpose, the awards were not duplicative. Others disagreed.*

*Although the New York Labor Law's current liquidated damages provision bears little resemblance to its predecessor, some courts continue to apply analyses of the old statute to the new one. This Note analyzes the effects that amendments enacted in 2009 and 2010 should have upon the preexisting split and contends that neither the current statutory text nor its legislative history conclusively supports characterizing the state provision*

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*exclusively as either compensatory or punitive. Instead, the evidence suggests a dual purpose. Since the awards overlap, courts can only avoid double recovery by awarding one set of liquidated damages.*

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## INTRODUCTION

Between 1999 and 2007, the Saigon Grill in New York City employed thirty-six Chinese immigrants as delivery workers.[1] None spoke English fluently, and none had received more than a "rudimentary" education in China.[2] They routinely worked thirteen-hour shifts, often without meal breaks, for as little as $1.60 an hour.[3] Thanks to federal and state wage and hour laws, their lawsuit resulted in a multimillion dollar award for back pay and damages.[4]

The Federal Fair Labor Standards Act of 1938[5] (FLSA) authorizes employees to file private actions to recover unpaid minimum wages and overtime compensation, plus an additional sum equaling 100 percent of those underpaid wages[6] as mandatory liquidated damages.[7] An employer may avoid liability for liquidated damages only upon demonstrating that it acted in "good faith" and had "reasonable grounds" for believing that its behavior did not violate the FLSA.[8] Currently, the New York Labor Law's (NYLL) relevant provisions parallel the FLSA's.[9]

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1. Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 245, 248 (S.D.N.Y. 2008).

2. *Id.* at 248.

3. *See id.* at 249–51; ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 8 (2009), *available at* http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1; Chuck Bennett, *It's the Fall of 'Saigon': Eatery Staff Wins $4M in 'Viet' War*, N.Y. POST (Oct. 22, 2008, 4:08 AM), http://www.nypost.com/p/news/regional/item_0T02j6LsKBE6KITzyyTUsO.

4. *See Saigon Grill*, 595 F. Supp. 2d at 267–81; BERNHARDT, *supra* note 3, at 8; Bennett, *supra* note 3.

5. 29 U.S.C. §§ 201–219 (2006).

6. Although both statutes define "wage," *see* 29 U.S.C. § 203(m); N.Y. LAB. LAW §§ 190(1), 651(7) (McKinney Supp. 2013), this Note uses the term colloquially to reference an employee's compensation for labor or services. This Note employs more specific terms, such as "minimum wage," "overtime compensation," or "regular rate," in accordance with statutory definitions, indicated as appropriate, *infra*.

7. *See* 29 U.S.C. § 216(b) (authorizing private actions and specifying the recovery available); *see also id.* § 206 (establishing a federal minimum wage); *id.* § 207(a)(1) (limiting workweek unless employee receives "one and one-half times the regular rate at which he is employed" for hours exceeding forty).

8. *See id.* § 260; 29 C.F.R. § 790.16, .22; *see also* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 150 (2d Cir. 2008); Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999), *modified*, Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003); Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 71 (2d Cir. 1997); 1 THE FAIR LABOR STANDARDS ACT 1-20 to -21 (Ellen C. Kearns ed., 2d ed. 2010) [hereinafter KEARNS]; 2 *id.* at 18-163.

9. *See, e.g.*, N.Y. LAB. LAW §§ 198(1-a), 663(1) (authorizing private actions for recovery of certain unpaid wages and overtime compensation, plus an additional 100 percent of those underpaid wages as mandatory liquidated damages unless an employer establishes a good-faith defense); *see also id.* § 652 (providing for the state minimum wage); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.1 (2012) (same); *id.* § 142-2.2 (providing for overtime compensation "at a wage rate of one and one-half times the employee's regular rate in the manner [of the FLSA]"). Article 6 of the NYLL (sections 190 to 199-D) is the state's Wage Payment Act, while article 19 (sections 650 to 665) is the state's Minimum Wage Act. Whether article 6 or article 19 applies depends upon the facts of a particular case. *See* Myers v. Hertz Corp., 624 F.3d 537, 545 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 368 (2011). The

Such conformity, however, did not always exist. An old New York statute enacted in 1967 (1967 Version) authorized employees to recover their unpaid wages, plus an additional 25 percent of those wages as liquidated damages *if* they could demonstrate that their employer's violation was willful.[10] Divergent interpretations of that statute created a split within the Second Circuit over whether liquidated damages could be awarded under both the federal and state statutes for the same underpaid wage or whether such an award would constitute an impermissible double recovery. Some courts reasoned that double recovery was avoided because the two liquidated damages provisions served different purposes—the FLSA's compensatory and the NYLL's punitive—while others reasoned that only a single award was appropriate because each provision remedied the same harm or served the same practical purpose.[11]

In 2009, an amendment (2009 Amendment) removed the willfulness requirement.[12] In 2010, another amendment (2010 Amendment) increased the amount of liquidated damages from 25 percent of the unpaid wages to 100 percent.[13] Despite the statutory overhaul, district courts in the Second Circuit have not seriously reassessed their positions, and some continue applying interpretations of the 1967 Version to the new statutory text.[14] Consequently, questions remain as to whether a plaintiff may recover liquidated damages under both statutes for the same underpaid wage. The answer depends on whether courts will construe the current statute, based upon its text and legislative history, as exclusively compensatory or

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NYLL's statutory remedies, including attorney's fees and liquidated damages, exceed the damages available for common law breach of contract claims. *See* Gottlieb v. Kenneth D. Laub & Co., 626 N.E.2d 29, 34 (N.Y. 1993). The statutory awards require substantive statutory violations and are not recoverable for common law breach of contract claims. *See id.* at 32–34. Because these two articles contain comparable liquidated damages provisions, for convenience this Note discusses only article 6's hereafter. *Compare* N.Y. LAB. LAW § 198(1-a), *with id.* § 663(1).

10. *See* Act of Apr. 18, 1967, ch. 310, § 1, 1967 N.Y. Laws 1014, 1014.

11. *Compare, e.g.*, Wicaksono v. XYZ 48 Corp., No. 10 Civ. 3635, 2011 WL 2022644, at *7 (S.D.N.Y. May 2, 2011) (surveying the split and awarding both FLSA and NYLL liquidated damages on same underlying wage according to a "different purposes" theory), *and* Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 261 (S.D.N.Y. 2008) ("Since the two awards serve different purposes, plaintiffs may recover both."), *with* Greathouse v. JHS Sec., Inc., No. 11 Civ. 7845, 2012 WL 3871523, at *7 (S.D.N.Y. Sept. 7, 2012) (surveying split and awarding liquidated damages under the statute providing the greater recovery, because both remedies address the same harm), *and* Janus v. Regalis Constr., Inc., No. 11-CV-5788, 2012 WL 3878113, at *7 (E.D.N.Y. July 23, 2012), *report and recommendation adopted*, 2012 WL 3877963 (E.D.N.Y. Sept. 4, 2012) (awarding liquidated damages under the statute providing the greater recovery, because both remedies serve the same practical purpose).

12. *See* Act of Aug. 26, 2009, ch. 372, 2009 N.Y. Laws 1086.

13. *See* Wage Theft Prevention Act of 2010, ch. 564, 2010 N.Y. Laws 1446.

14. *See, e.g.*, Garcia v. Giorgio's Brick Oven & Wine Bar, No. 11 Civ. 4689, 2012 WL 3339220, at *4–5 (S.D.N.Y. Aug. 15, 2012) (relying on cases interpreting the 1967 Version for a "different purposes" analysis applied to the current statutory text), *report and recommendation adopted*, 2012 WL 3893537 (S.D.N.Y. Sept. 7, 2012); Angamarca v. Pita Grill 7 Inc., No. 11 Civ. 7777, 2012 WL 3578781, at *8 (S.D.N.Y. Aug. 2, 2012) (same).

punitive in purpose. If left unaddressed, this issue threatens to perpetuate a practice of inconsistent awards in wage and hour cases.

Consistency in wage and hour cases is increasingly important, because headline-grabbing cases like *Saigon Grill*[15] form only the tip of the iceberg when it comes to the scourge of wage and hour violations plaguing New York and the nation. America's low-wage workers regularly suffer minimum wage and overtime compensation violations.[16] In 2008, the National Employment Law Project (NELP) surveyed 4,387 workers in low-wage industries in major American cities, including Chicago, Los Angeles, and New York.[17] The survey revealed that 26 percent of respondents were paid less than the required minimum wage.[18] Further, 25 percent of respondents reported working overtime, 76 percent of whom were paid less than the required overtime rate.[19] Moreover, the average overtime worker accumulated eleven hours of overtime per week that were "either underpaid or not paid at all."[20] New York City's figures parallel the national data.[21]

The harms of wage and hour violations extend far beyond those inflicted upon individual workers—they also ripple throughout the economy.[22] Wage underpayment deprives communities of business- and job-sustaining spending, limits economic development, reduces tax revenues, and burdens social safety nets.[23] It creates unfair competition for honest employers and drives down other workers' wages.[24] Wage and hour violations also impact

15. *See Saigon Grill*, 595 F. Supp. 2d at 240; Bennett, *supra* note 3.

16. *See* BERNHARDT, *supra* note 3, at 19–21.

17. *See id.* at 2.

18. *Id.*

19. *Id.* at 2, 21.

20. *Id.* at 2, 22.

21. A 2008 NELP survey of 1,432 low-wage workers in New York City indicated that 21 percent of respondents were paid less than the minimum wage; 36 percent of respondents worked overtime, 77 percent of whom were paid less than the required overtime rate; and the average overtime worker accumulated thirteen hours of unpaid or underpaid overtime per week. *See* ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, WORKING WITHOUT LAWS: A SURVEY OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 2, 18 (2010), *available at* http://nelp.3cdn.net/990687e422dcf919d3_h6m6bf6ki.pdf; *see also* Annette Bernhardt, *Wages Belong to the Workers*, ALBANY TIMES UNION, Nov. 24, 2010, at A11, *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 37 (discussing NELP's New York City survey).

22. *See* BERNHARDT, *supra* note 3, at 50.

23. *See id.*; *see also* Unpaid Wages Prohibition Act of 1997, ch. 605, § 1, 1997 N.Y. Laws 3392, 3392–93 ("Low-wage workers who are unpaid or underpaid cannot support themselves and their families, and may be forced to rely on scarce public resources.").

24. *See* BERNHARDT, *supra* note 3, at 50; *see also* Unpaid Wages Prohibition Act of 1997, § 1 (describing the impact violations have on New York's economy). Some businesses even attempt to substitute "unpaid interns" for paid employees. *See* Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 6, 2012, at A1 (describing the market for postgraduate unpaid internships); Jeffrey W. Rubin & Michael Berkowitz, *Risky Business: Using Unpaid Interns*, 146 DAILY LAB. REP. (BNA) I-1 (2012) (outlining the ways that employers can structure unpaid internships to reduce the risks of wage and hour litigation); Steven Greenhouse, *The Uses and Misuses of Unpaid Internships*, N.Y. TIMES (May 7, 2012, 2:01 PM), http://economix.blogs.nytimes.com/2012/05/07/the-

the legal community. Since 2008, the number of federal wage and hour cases has exploded, increasing by approximately 30 percent nationally.[25] Wage and hour cases now represent one of the "fastest growing areas of litigation," and "mill" specialist firms have emerged across the country.[26]

The trend shows no signs of easing, due to an unbalanced labor market exacerbated by the recent economic downturn.[27] Although job losses were widespread during the recession, they hit mid-wage occupations the hardest and pushed many workers into low-wage positions.[28] Post-recession job growth has concentrated on low-wage occupations, growing 2.7 times faster than mid-wage and high-wage positions.[29] Compounding these effects, low-wage jobs account for "eight out of the top 10 occupations projected to grow the most by 2018."[30]

This Note analyzes the effects that the 2009 and 2010 Amendments should have upon the preexisting split over whether a plaintiff may recover both federal and state liquidated damages for the same underpaid wage. Part I introduces the FLSA and NYLL's relevant provisions; key concepts

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uses-and-misuses-of-unpaid-internships/?ref=stevengreenhouse (chronicling the "considerable dismay" with certain postgraduate unpaid internships).

25. *See* Mitchell Hartman, *More Overtime Hours, Less Overtime Pay?*, MARKETPLACE (July 12, 2012), http://www.marketplace.org/topics/wealth-poverty/more-overtime-hours-less-overtime-pay.

26. *See* Christopher M. Pardo, *The Cost of Doing Business: Mitigating Increasing Recession Wage and Hour Risks While Promoting Economic Recovery*, 10 J. BUS. & SEC. L. 1, 10–13 (2010) (explaining the various reasons for the increased frequency of wage and hour litigation); *see also* Simona Covel, *Businesses Face Threat of Lawsuits from Laid-Off Employees*, WALL ST. J. (Feb. 18, 2009, 2:01 PM), http://blogs.wsj.com/independentstreet/2009/02/18/businesses-face-threat-of-lawsuits-from-laid-off-employees/; Alexander Eichler, *Unpaid Overtime: Wage and Hour Lawsuits Have Skyrocketed in the Last Decade*, HUFFINGTON POST (May 30, 2012, 2:47 PM), http://www.huffingtonpost.com/2012/05/30/wage-hour-lawsuits_n_1556484.html; Martha Graybow, *Tough Times Spur Laid-Off Workers To Sue*, REUTERS (Nov. 11, 2008, 9:44 AM), http://www.reuters.com/article/newsOne/idUSN0640986220081111; Sally Roberts, *Time Is Big Bucks, Class-Action Wage Lawsuits Show*, WORKFORCE (Dec. 21, 2007), http://www.workforce.com/article/20071221/NEWS01/312219994.

27. *See* NAT'L EMP'T LAW PROJECT, THE LOW-WAGE RECOVERY AND GROWING INEQUALITY 1 (2012), *available at* http://www.nelp.org/page/-/Job_Creation/LowWageRecovery2012.pdf?nocdn=1; Catherine Rampell, *Majority of Jobs Added in the Recovery Pay Low Wages, Study Finds*, N.Y. TIMES, Aug. 31, 2012, at B1.

28. *See* NAT'L EMP'T LAW PROJECT, *supra* note 27, at 1. Low-wage occupations constituted 21 percent of job losses, mid-wage 60 percent, and high-wage 19 percent. *See id.*; *see also* Rampell, *supra* note 27 (discussing studies about the "polarization" of skills and wages). NELP defines "lower-wage occupations" as those with median hourly wages of $7.69 to $13.83, "mid-wage occupations" as $13.84 to $21.13, and "higher-wage occupations" as $21.14 to $54.55. *See* NAT'L EMP'T LAW PROJECT, *supra* note 27, at 2.

29. *See* NAT'L EMP'T LAW PROJECT, *supra* note 27, at 1. Low-wage occupations constituted 58 percent of job growth, mid-wage 22 percent, and high-wage 20 percent. *See id.*; *see also* Rampell, *supra* note 27.

30. Bernhardt, *supra* note 21, *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 37 (describing these occupations as "home care and child care workers, dishwashers, food prep[aration] workers, construction workers, cashiers, laundry workers, garment workers, security guards and janitors"); *see also* Letter from Nat'l Emp't Law Project to Governor David A. Paterson (Dec. 6, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 56.

including double recovery, statutory multiple damages, and principles of New York statutory construction; and finally the leading judicial interpretations of the FLSA and NYLL's liquidated damages provisions' respective purposes. Part II presents the preexisting split within the Second Circuit concerning awards made under the FLSA and the 1967 Version and discusses the effects of and purposes for the 2009 and 2010 Amendments. Finally, Part III argues that plaintiffs should be limited to one liquidated damages award to avoid double recovery because the current NYLL liquidated damages provision is both compensatory and punitive in purpose, thus overlapping with the FLSA.

## I. BASIC ELEMENTS: THE FAIR LABOR STANDARDS ACT, THE NEW YORK LABOR LAW, AND DOUBLE RECOVERY

This part begins with an introduction to the relevant FLSA and NYLL liquidated damages provisions before proceeding to a general discussion of related legal concepts, including the double recovery doctrine, the respective purposes of compensatory and punitive damages, the various roles that statutory multiple damages play, and the basic tenets of New York statutory construction. This part concludes with the leading judicial interpretations characterizing the FLSA's liquidated damages as compensatory and the 1967 Version's as punitive.

### *A. Relevant Statutory Provisions*

The FLSA and NYLL have a lot in common. This section sketches the basic framework of each statute's liquidated damages provisions.

#### 1. The Fair Labor Standards Act

The FLSA is a comprehensive federal statute governing a wide array of employment matters.[31] Among its most basic provisions are 29 U.S.C. § 206, establishing the federal minimum wage, and § 207, requiring overtime compensation at 150 percent of an employee's regular rate.[32] Such measures are intended to protect vulnerable low-wage workers from economic distress while promoting their health and general well-being.[33]

31. *See* 29 U.S.C. §§ 201–219 (2006).

32. *See id.* §§ 206, 207(a)(1). An employee's "regular rate" should not be confused with the "minimum wage" rate. *Compare id.* § 206 (specifying the minimum wage rate), *with id.* § 207(e) (defining "regular rate" for purposes of overtime compensation calculations).

33. *See id.* § 202(a) (declaring Congress's intent to protect the "minimum standard of living necessary for health, efficiency, and general well-being of workers"); *see also* United States v. Rosenwasser, 323 U.S. 360, 361 (1945) (observing Congress's intent to protect workers "from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health"); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942) (quoting President Franklin D. Roosevelt's message emphasizing the FLSA's provision of "[a] fair day's pay for a fair day's work" and of protections from the "evil" of "overwork" and "underpay"); United States v. Darby, 312 U.S. 100, 109 (1941) (citing Congress's concern over the "maintenance of the minimum standards of living necessary for health and general well-being" of workers).

Section 216(b) authorizes private actions to safeguard the FLSA's reforms.[34] In such actions, employers that have violated § 206 or § 207 "shall be liable" not only for unpaid wages but also "an additional equal amount as liquidated damages" (i.e., 100 percent liquidated damages).[35] These liquidated damages are automatic and do not require an employee to demonstrate that an employer's violation arose willfully or due to any other culpable state of mind.[36]

Until 1947, liquidated damages awards were mandatory in *all* successful actions brought under § 216(b).[37] At that time, Congress, reacting to early U.S. Supreme Court cases interpreting § 216, enacted the Portal-to-Portal Pay Act[38] (PPA), which provided employers with opportunities to avoid liquidated damages in certain situations.[39] First, the PPA allowed for the compromise of claims "if there exists a bona fide dispute as to the amount payable," as well as for the waiver of liquidated damages.[40] Next, the PPA set a two-year statute of limitations for FLSA claims, since none had existed previously.[41] Finally, the PPA gave courts broad discretion to reduce or deny liquidated damages where an employer demonstrates that it

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34. *See* 29 U.S.C. § 216 (authorizing private actions under § 216(b) and official actions under § 216(c) for violations of § 206 or § 207).

35. *Id.* § 216(b)–(c); *see also* 2 KEARNS, *supra* note 8, at 18-160. Section 216(b) provides, in part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages . . . . An action to recover the liability prescribed . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b).

36. *See* 29 U.S.C. § 216(b).

37. *See* 2 KEARNS, *supra* note 8, at 18-160; *see also* Renteria v. Italia Foods, Inc., No. 02 C 495, 2003 WL 21995190, at *4 (N.D. Ill. Aug. 21, 2003).

38. Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262).

39. *See id.* One of those early cases was *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), in which a bank, realizing it had improperly compensated an employee's overtime, subsequently paid the employee in full and obtained a release from the employee's FLSA claims. *See id.* at 700. Notwithstanding the release, the employee sued to recover FLSA liquidated damages. *See id.* The Court held that an overriding public interest inherent in the FLSA prohibited employees from relinquishing their rights to liquidated damages, so such a waiver was "absolutely void." *See id.* at 713–14; *see also* 1 KEARNS, *supra* note 8, at 1-18; 2 *id.* at 18-160.

40. *See* § 3(a)–(b), 61 Stat. at 86; 1 KEARNS, *supra* note 8, at 1-20. Compromised claims may not yield sums less than statutory minimum wage and overtime compensation rates require. *See* 29 U.S.C. § 253; 1 KEARNS, *supra* note 8, at 1-20; *see also* 29 U.S.C. §§ 206–207.

41. The PPA enacted a two-year statute of limitations. *See* § 6(a), 61 Stat. at 87–88; McLaughlin v. Richland Shoe Co., 486 U.S. 128, 131–32 (1988); 1 KEARNS, *supra* note 8, at 1-21. A 1966 amendment extended the PPA's limitations period to three years *if* a claim arose from a "willful" violation. *See* Act of Sept. 23, 1966, Pub. L. No. 89-601, tit. VI, § 601(b), 80 Stat. 830, 844 (codified as amended at 29 U.S.C. § 255); *McLaughlin*, 486 U.S. at 131–32; 1 KEARNS, *supra* note 8, at 1-21.

acted in "good faith" and had "reasonable grounds" for believing that its behavior did not violate the FLSA.[42] Establishing the good-faith defense requires demonstrating affirmative steps taken to ascertain and comply with the FLSA.[43] Thus, ignorance and negligence are inadequate defenses.[44] The employer's burden is "difficult" to meet and must be met by "plain and substantial evidence."[45] Consequently, "[d]ouble damages are the norm, single damages the exception."[46]

### 2. The New York Labor Law

Like the FLSA, the NYLL governs a wide array of employment matters. Many of its provisions parallel the FLSA's, such as those establishing a minimum wage[47] and requiring overtime compensation at 150 percent of an employee's regular rate.[48] Further, section 198(1-a) authorizes private enforcement actions, in which an underpaid employee shall recover unpaid wages plus an "additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due."[49] Finally, an employer can avoid the NYLL's automatic liquidated damages upon proving a good-faith basis for believing that the underpayment complied with the law.[50] Only recently, however, has such great conformity between the two liquidated damages provisions arisen.

The relevant evolution of section 198 dates back at least to 1921, when New York passed a comprehensive set of labor laws, some of which

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42. *See* § 11, 61 Stat. at 89; 29 C.F.R. § 790.16, .22; *see also* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 150 (2d Cir. 2008); Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999), *modified*, Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003); Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 71 (2d Cir. 1997); 1 KEARNS, *supra* note 8, at 1-21; 2 *id.* at 18-163. Section 260 provides, in part:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260.

43. *See Barfield*, 537 F.3d at 150–51 (citing *Herman*, 172 F.3d at 142 and *Reich*, 121 F.3d at 71).

44. *See Reich*, 121 F.3d at 71 ("'Good faith' . . . requires more than ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them.").

45. *Id.*

46. *Id.* (alteration in original).

47. *Compare* 29 U.S.C. § 206, *with* N.Y. LAB. LAW § 652 (McKinney Supp. 2013), *and* N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.1 (2012).

48. *Compare* 29 U.S.C. § 207, *with* N.Y. LAB. LAW § 160, *and* N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2.

49. *Compare* 29 U.S.C. § 216, *with* N.Y. LAB. LAW § 198(1-a); *see also supra* note 9 and accompanying text.

50. *Compare* 29 U.S.C. §§ 216, 260, *with* N.Y. LAB. LAW § 198(1-a).

governed the payment of wages.[51] Article 6, entitled "Payment of Wages," provided for a fifty dollar civil penalty, payable to the state, for the failure of a "corporation or joint-stock association" to pay its employees' wages.[52] Subsequently, the legislature enacted a series of amendments, which gradually broadened the provision's scope to a wider variety of employers and employees.[53]

Acts passed in 1966 and 1967, however, marked dramatic departures from the simple fifty-dollar civil penalty traditionally paid into state coffers.[54] In 1966, the New York State Department of Labor (NYDOL) sponsored the recodification of article 6.[55] The language governing the fifty-dollar civil penalty was moved from section 198 to section 197, which retained the heading "Civil penalty,"[56] and the new section 198, labeled "Costs, remedies," provided that a prevailing employee "may" recover "in addition to ordinary costs, a reasonable sum, not exceeding fifty dollars for expenses which may be taxed as costs."[57] One year later, New York added section 198(1-a), which required employers to pay employees who prevailed in court an additional 25 percent of unpaid wages as "liquidated damages" for "willful" violations of the state's wage and hour laws.[58]

The 1967 Version's language remained unchanged for decades until 2009, when New York eliminated the willfulness requirement and replaced it with a presumption that liquidated damages are available unless the employer establishes a good-faith defense.[59] Shortly after enacting the 2009 Amendment, New York passed the 2010 Amendment as part of the

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51. Act of Mar. 9, 1921, ch. 50, §§ 195–198, 1921 N.Y. Laws 132, 165–66.

52. *Id.* § 198, 1921 N.Y. Laws at 166. Section 198 of the 1921 statute provided:

> If a corporation or joint-stock association, its lessee or other person carrying on the business thereof, shall fail to pay the wages of all its employees, as provided in this article, it shall forfeit to the people of the state the sum of fifty dollars for each such failure, to be recovered by the commissioner in a civil action.

*Id.*

53. *See* Act of June 14, 1965, ch. 354, § 1, 1965 N.Y. Laws 1111, 1111–12 (expanding to include employers who "differentiate in rate of pay because of sex"); Act of Apr. 14, 1944, ch. 793, § 1, 1944 N.Y. Laws 1755, 1756 (expanding to include employers who "discriminate in rate of pay"); Act of May 21, 1934, ch. 745, § 1, 1934 N.Y. Laws 1520, 1520–21 (expanding to include violations by "person[s]" or "copartnership[s]").

54. Act of Apr. 18, 1967, ch. 310, § 1, 1967 N.Y. Laws 1014, 1014; Act of June 14, 1966, ch. 548, § 2, 1966 N.Y. Laws 1293, 1298.

55. *See* 1966 N.Y. Laws at 1293 n.*; Memorandum from Indus. Comm'r (June 3, 1966), *reprinted in* N.Y. Bill Jacket 1966, ch. 548, at 4–5; *see also* Gottlieb v. Kenneth D. Laub & Co., 626 N.E.2d 29, 31–32 (N.Y. 1993).

56. § 2, 1966 N.Y. Laws at 1298.

57. *Id.*

58. § 1, 1967 N.Y. Laws at 1014. The 1967 amendment created section 198(1-a), which provided:

> In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, upon a finding that the employer's failure to pay the wage required by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the wages found to be due.

*Id.*

59. *See* Act of Aug. 26, 2009, ch. 372, § 1, 2009 N.Y. Laws 1086, 1086.

Wage Theft Prevention Act of 2010[60] (WTPA).[61] The WTPA increased penalties for certain violations of the state's labor laws, and it required employers to provide employees with certain notifications related to their work and pay.[62] The WTPA also amended section 198(1-a) by increasing the amount of liquidated damages recoverable in a private action from 25 percent of unpaid wages to 100 percent.[63]

### *B. Double Recovery and Damages*

After explaining the double recovery doctrine, this section discusses compensatory and punitive damages, which are two types of damages available at law. Understanding the role that each category plays is essential when determining the nature or purpose of a statutory multiple damages provision, as described toward the end of this subsection.

#### 1. Double Recovery

The potential for double recovery inevitably arises in New York wage and hour cases when plaintiffs allege violations of both the FLSA and NYLL. The FLSA has a two-year statute of limitations that expands to three years for willful violations.[64] The NYLL, on the other hand, has a six-year statute of limitations, regardless of willfulness.[65] When a prevailing plaintiff claims both federal and state damages arising from back pay accrued during the overlapping two- to three-year period, courts must determine whether to award damages under the federal statute, the state statute, or both.

As the Supreme Court has declared, "courts can and should preclude double recovery."[66] The double recovery doctrine restricts a plaintiff to a single recovery for a single injury, even if the plaintiff pleads and tries multiple or alternative legal theories of recovery.[67] Thus, if a federal claim

60. ch. 564, 2010 N.Y. Laws 1446.

61. *See id*. § 7, 2010 N.Y. Laws at 1450.

62. *See* Governor's Approval Memorandum, *reprinted in* 2010 N.Y. ST. LEGIS. ANN. 429–30 (addressing the controversy over WTPA's notice requirements). *See generally* 2010 N.Y. Laws at 1446–58.

63. *See* § 7, 2010 N.Y. Laws at 1450.

64. *See* 29 U.S.C. § 255 (2006); *see also supra* note 41 and accompanying text.

65. *See* N.Y. LAB. LAW § 198(3) (McKinney Supp. 2013).

66. EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002) (quoting Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 333 (1980)); *see also* Phelan v. Local 305 of the United Ass'n of Journeymen, 973 F.2d 1050, 1063 (2d Cir. 1992) ("A plaintiff may not recover twice for the same injury."); Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 649 (2d Cir. 1989); Barrington v. New York, 806 F. Supp. 2d 730, 740 (S.D.N.Y. 2011) ("'It has been broadly stated that judicial policy forestalls a double recovery for an injury.'" (quoting Zarcone v. Perry, 434 N.Y.S.2d 437, 443 (App. Div. 2d Dep't 1980))); 1 DAN B. DOBBS, LAW OF REMEDIES § 1.1, at 2–3 (2d ed. 1993).

67. *See* BLACK'S LAW DICTIONARY 1389 (9th ed. 2009) (defining "double recovery" as a "judgment that erroneously awards damages twice for the same loss, based on two different theories of recovery"); *see also* Mason v. Okla. Tpk. Auth., 115 F.3d 1442, 1459–60 (10th Cir. 1997), *overruled on other grounds by* TW Telecom Holdings Inc. v. Carolina Internet

and a state claim arise from the same injury and seek the same relief, damages awarded under both theories would constitute a double recovery.[68] In the absence of punitive damages, a plaintiff can recover no more than the loss actually suffered, because a larger award would produce a windfall.[69] That said, compensatory awards for multiple injuries stemming from a single act or omission do not offend double recovery, provided they do not encompass duplicative elements or exceed the aggregate harm caused.[70]

To illustrate, both the FLSA and NYLL provide for the full recovery of unpaid overtime compensation.[71] Although these statutes overlap, courts will not permit plaintiffs to recover those wages twice, because doing so would award a windfall.[72]

The doctrine's application, however, is less straightforward where liquidated damages are involved. In addition to the underlying wage, both the FLSA and NYLL provide for multiple damages as liquidated damages.[73] Whether prevailing plaintiffs are entitled to both sets of liquidated damages depends upon whether each is considered compensatory or punitive in nature.[74] Compensatory and punitive damages perform different functions, but are typically awarded together.[75] Since awards serving different functions are not duplicative, their combination does not offend double recovery.[76]

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Ltd., 661 F.3d 495 (10th Cir. 2011); *Phelan*, 973 F.2d at 1063; *Ostano Commerzanstalt*, 880 F.2d at 649.

68. *See* 2 ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CIVIL § 79:3, at 502 (2012).

69. *See* BLACK'S LAW DICTIONARY, *supra* note 67, at 1389 (defining "double recovery" as a "[r]ecovery by a party of more than the maximum recoverable loss that the party has sustained"); *id.* at 1738 (defining "windfall" as "[a]n unanticipated benefit, usu. in the form of a profit and not caused by the recipient"); *see also* 1 DOBBS, *supra* note 66, § 1.1, at 4 (describing punitive damages as "noncompensatory" damages). For a discussion of "actual damages," see *infra* Part I.B.2.

70. *See, e.g.*, St. Louis, Iron Mountain, & S. Ry. Co. v. Craft, 237 U.S. 648, 658 (1915) ("Although originating in the same wrongful act or neglect . . . [a decedent's pain and suffering and a beneficiary's pecuniary losses] are quite distinct . . . . One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong."); 1 DOBBS, *supra* note 66, § 1.1, at 3 ("[A] plaintiff can have more than one remedy so long as the total does not provide more than one complete compensation or one complete restitution.").

71. *See* 29 U.S.C. § 216 (2006); N.Y. LAB. LAW § 198(1-a) (McKinney Supp. 2013); *see also* Ramos v. Baldor Specialty Foods, Inc., 687 F.3d 554, 556 n.1 (2d Cir. 2012) (noting that the NYLL mandates overtime pay in the same manner as the FLSA); Reiseck v. Universal Commc'ns of Miami, Inc., 591 F.3d 101, 105 (2d Cir. 2010) (same).

72. *See, e.g.*, Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 262 n.44 (S.D.N.Y. 2008); *see also* Janus v. Regalis Constr., Inc., No. 11-CV-5788, 2012 WL 3878113, at *7 (E.D.N.Y. July 23, 2012), *report and recommendation adopted*, 2012 WL 3877963 (E.D.N.Y. Sept. 4, 2012); 2 KEARNS, *supra* note 8, at 18-148 (observing that "courts have consistently held that the recovery of the same compensatory damages under both the [FLSA] and a state regime is impermissible").

73. *See* 29 U.S.C. § 216(b); N.Y. LAB. LAW § 198(1-a).

74. For a discussion of the split within the Second Circuit on this issue, see *infra* Part II.

75. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); *see also* Cooper Indus., Inc., v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001).

76. *See* Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 649 (2d Cir. 1989); *see also* Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999)

2. Compensatory Damages, Prejudgment Interest, and Liquidated Damages

Compensatory damages redress the actual losses a plaintiff has suffered.[77] They are intended to make the plaintiff whole again, restoring the position that would have been occupied had an injury never occurred.[78] Compensatory damages are limited to the amount a plaintiff actually lost, because a plaintiff should not receive a windfall or profit from an injury.[79]

Prejudgment interest is a type of compensatory damage, because it is an equitable award that compensates plaintiffs for the lost use of money during a period preceding the entry of judgment.[80] It represents part of a plaintiff's actual damages and is designed to make the plaintiff whole.[81] In federal actions, prejudgment interest awards are typically discretionary.[82] Usually,

(awarding both state liquidated damages and state prejudgment interest on the same underpaid wage, because each award serves a different purpose); Phelan v. Local 305 of the United Ass'n of Journeymen, 973 F.2d 1050, 1063 (2d Cir. 1992) ("When a plaintiff receives a payment from one source for an injury, defendants are entitled to a credit of that amount against any judgment obtained by the plaintiff as long as both payments represent common damages"); 2 KEARNS, *supra* note 8, at 18-148 to -149 ("[S]everal courts have held that an employer is subject to both state and federal remedial measures that the court finds are not duplicative.").

77. *See* BLACK'S LAW DICTIONARY, *supra* note 67, at 445 (defining "actual damages" as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses" and as "compensatory damages"); *see also Campbell*, 538 U.S. at 416; *Cooper Indus.*, 532 U.S. at 432; RESTATEMENT (SECOND) OF TORTS § 903 (1977).

78. *See* BLACK'S LAW DICTIONARY, *supra* note 67, at 445 (defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered" and as "actual damages"); *see also Campbell*, 538 U.S. at 416.

79. *See* 25 C.J.S. *Damages* § 118 (2012).

80. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715 (1945) ("[I]nterest is customarily allowed as compensation for delay in payment."); Brock v. Superior Care, Inc., 840 F.2d 1054, 1064 (2d Cir. 1988) (permitting prejudgment interest in the absence of FLSA liquidated damages); Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 58 (2d Cir. 1984) ("Prejudgment interest obviously serves the compensatory purpose by making up for the delay in receiving the money, during which time the employees were denied its use, and by partially offsetting the reduction in the value of the delayed wages caused by inflation."); *see also* N.Y. C.P.L.R. 5001(b) (McKinney 2007) (specifying that prejudgment interest should be calculated "from the earliest ascertainable date the cause of action existed" or when damage was incurred); 1 DOBBS, *supra* note 66, § 3.6(1)–(2), at 333, 346 (discussing various potential starting points for prejudgment interest calculations).

81. *See* Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 335 (1988); *see also*, *e.g.*, Osterneck v. Ernst & Whinney, 489 U.S. 169, 175 (1989) ("[P]rejudgment interest traditionally has been considered part of the compensation due plaintiff."); Loeffler v. Frank, 486 U.S. 549, 558 (1988); West Virginia v. United States, 479 U.S. 305, 310–11 (1987); Gen. Motors Corp. v. Devex Corp., 461 U.S. 648, 655–56 (1983).

82. Gierlinger v. Gleason, 160 F.3d 858, 873 (2d Cir. 1998); *see also* Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1071–72 (2d Cir. 1995). Courts exercising such discretion weigh numerous factors, such as "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." Jones v. UNUM Life Ins. Co. of Am., 223 F.3d 130, 139 (2d Cir. 2000) (considering four factors enumerated in SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996)); *see also* SEC v. Milligan, 436 F. App'x 1, 3 (2d Cir. 2011) (affirming a district court's application of the *First Jersey Securities* factors).

a pecuniary award will not fully compensate a plaintiff unless it includes an "interest component."[83] Therefore, when damages represent compensation for lost wages, "it is ordinarily an abuse of discretion *not* to include pre-judgment interest" in some manner.[84] Practically, prejudgment interest prevents employers from "enjoy[ing] an interest-free loan" at their employees' expense and promotes settlements by discouraging defendants from delaying payments to injured plaintiffs.[85] Despite these deterrent effects, prejudgment interest is not considered to be a punitive award or an additional penalty because the "essential rationale" for awarding prejudgment interest is ensuring that a plaintiff is fully compensated.[86]

Finally, parties may stipulate to the recovery of "liquidated damages"—predetermined or estimated amounts—in lieu of actual damages.[87] Liquidated damages help aggrieved parties avoid the difficulty, expense, and uncertainty of itemizing and proving damages in court.[88]

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83. Kansas v. Colorado, 533 U.S. 1, 10–11 (2001); *see also, e.g.*, City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 195 (1995); *West Virginia*, 479 U.S. at 310–11; *Devex*, 461 U.S. at 655–56. *But see* Bd. of Comm'rs v. United States, 308 U.S. 343, 352 (1939) ("[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.").

84. *Gierlinger*, 160 F.3d at 873 (collecting cases and quoting Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134, 145 (2d Cir. 1993)); *Donovan*, 726 F.2d at 57–58 ("[I]t is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award under [§ 217 of] the FLSA."); Thomas v. iStar Fin., Inc., 508 F. Supp. 2d 252, 264 (S.D.N.Y. 2007) (citing *Gierlinger*, 160 F.3d at 873–74), *aff'd*, 652 F.3d 141, 150 (2d Cir. 2011).

85. *Gierlinger*, 160 F.3d at 873–74 (quoting *Saulpaugh*, 4 F.3d at 145); *Donovan*, 726 F.2d at 58 ("Failure to award interest would create an incentive to violate the FLSA, because violators in effect would enjoy an interest-free loan for as long as they could delay paying out back wages."); 1 DOBBS, *supra* note 66, § 3.6(1)–(2), at 333–34, 346.

86. *See City of Milwaukee*, 515 U.S. at 195 ("The essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss."); *see also* Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999) ("The purpose of a prejudgment interest award . . . is to compensate a plaintiff for the loss of use of money." (quoting Chandler v. Bombardier Capital Inc., 44 F.3d 80, 83 (2d Cir. 1994))); *Donovan*, 726 F.2d at 57–58 (describing prejudgment interest's compensatory purpose and its secondary deterrent effects); Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422, 447 (2d Cir. 1975) ("[A]wards of prejudgment interest are essentially compensatory, and wrongdoing by a defendant is not a prerequisite to an award." (citation omitted)).

87. *See* BLACK'S LAW DICTIONARY, *supra* note 67, at 445 ("[Liquidated damages are a]n amount . . . stipulated as a reasonable estimation of actual damages to be recovered . . . . [T]he sum fixed is the measure of damages . . . , whether it exceeds or falls short of the actual damages."). Of course, statutory multiple damages differ from traditional liquidated damages, because the parties do not specify them—the legislature sets them instead. As the Second Circuit observed, the FLSA's use of the phrase is "something of a misnomer." Brock v. Superior Care, Inc., 840 F.2d 1054, 1063 n.3 (2d Cir. 1988).

88. *See, e.g.*, N.Y. U.C.C. LAW § 2-718 (McKinney 2002) (allowing certain contracting parties to set liquidated damages "at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."); *see also* BLACK'S LAW DICTIONARY, *supra* note 67, at 446, 448 (distinguishing "general damages," which

### 3. Punitive Damages

Punitive damages have a long history in Anglo-American jurisprudence.[89] Today, American courts consider punitive damages to be a category of damages distinct from compensatory damages.[90] Courts regularly instruct juries on the twin goals of modern punitive awards: deterrence and retribution.[91] Thus, a defendant's culpability is an important factor, and courts typically limit punitive damages to cases of "enormity, where a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable."[92] Large punitive awards might be justified when wrongdoing is hard to detect or when an injury and its corresponding compensatory award are small.[93] Thus, punitive damages

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frequently result from torts and "do not need to be specifically claimed," from "special damages," which must be "specifically claimed or proved").

89. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 490–92 (2008) (surveying the evolution of punitive damages in the Anglo-American tradition).

90. *See id.* at 492 (citing Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851)). *See generally* 1 DOBBS, *supra* note 66, § 3.11(1), at 455 ("Punitive damages are sums awarded in addition to any compensatory or nominal damages."); 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 1.4(B), at 17 (6th ed. 2010) ("[I]t has been a well settled doctrine in [the United States] for over a century that punitive damages are non-compensatory in character.").

91. For example, New York instructs juries: "The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for [wanton, reckless, or malicious] acts and thereby to discourage the defendant and other[s] from acting in a similar way in the future." 1B COMM. ON PATTERN JURY INSTRUCTIONS ASS'N OF JUSTICES OF THE SUPREME COURT OF THE STATE OF N.Y., NEW YORK PATTERN JURY INSTRUCTIONS CIVIL § 2:278, at 830 (3d ed. 2012); *see also Baker*, 554 U.S. at 492–93, 513; Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("[P]unitive damages . . . are aimed at deterrence and retribution."); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (stating that punitive damages are "intended to punish the defendant and to deter future wrongdoing"); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981); RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1977); 1 DOBBS, *supra* note 66, § 3.11(1), at 455 ("Punitive damages are sums awarded . . . , usually as punishment or deterrent."); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2081–82 (1998).

92. *Baker*, 554 U.S. at 493 (citations and internal quotation marks omitted); *see also Day*, 54 U.S. at 371; RESTATEMENT (SECOND) OF TORTS § 908(2); BLACK'S LAW DICTIONARY, *supra* note 67, at 448 (defining "punitive damages" as "[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer or making an example to others" and explaining that punitive damages are intended to punish and deter "blameworthy" conduct); 1 SCHLUETER, *supra* note 90, § 9.3(A), at 634–39.

93. *See Baker*, 554 U.S. at 494 (citing *Gore*, 517 U.S. at 582 and RESTATEMENT (SECOND) OF TORTS § 908 cmt. c); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) ("It is in the nature of punitive remedies to authorize awards that may be out of proportion to actual injury; such remedies typically are established to deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter.").

serve broad societal purposes[94] and may even function like criminal penalties.[95]

### 4. Statutory Multiple Damages

Many statutes specify awards that double, triple, or multiply damages by some other factor.[96] Such multiple damages can be compensatory or punitive in nature.[97] The distinction between compensatory and punitive statutory damages is especially significant in New York, because a state procedural rule bars recovery of statutory penalties in class actions unless the statute imposing the penalty specifically authorizes class recovery.[98]

Punitive statutory multiple damages differ from the common law punitive damages because statutes cap the maximum punitive award.[99] The fixed limit may reduce the potential threat to a defendant and "the possibility of a measured deterrence."[100]

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94. *See Baker*, 554 U.S. at 491–92; *Campbell*, 538 U.S. at 416; *Cooper Indus.*, 532 U.S. at 432; *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Haslip*, 499 U.S. at 19 ("[P]unitive damages are imposed for purposes of retribution and deterrence."); 1B NEW YORK PATTERN JURY INSTRUCTIONS § 2:278, at 838 ("Punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose, even when prosecuted in the context of personal injury actions . . . . [P]unitive damages have been held inapplicable to certain types of claims, . . . [absent] conduct aimed at the public.").

95. *See Campbell*, 538 U.S. at 417; *see also* 1 DOBBS, *supra* note 66, § 3.11(1), at 457 (explaining that punitive damages serve "as a means of securing public good through a kind of quasi-criminal punishment in the civil suit"). In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court observed, "[a]lthough these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." 538 U.S. at 417. The Court used "three guideposts" to analyze the reasonableness of a $145 million punitive award accompanying only $1 million in compensatory damages, including: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.*; *see also Cooper Indus.*, 532 U.S. at 424; *Gore*, 517 U.S. at 575. The most important guidepost is "the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575).

96. *See Baker*, 554 U.S. at 511–12 (collecting various statutes exemplifying multiple damages provisions); 1 DOBBS, *supra* note 66, § 3.12, at 541–42 (same); *see also* BLACK'S LAW DICTIONARY, *supra* note 67, at 447 (defining "multiple damages" as "[s]tatutory damages (such as double or treble damages) that are a multiple of the amount that the fact-finder determines to be owed").

97. 1 DOBBS, *supra* note 66, § 3.12, at 543.

98. *See* N.Y. C.P.L.R. 901(b) (McKinney 2006); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (determining that N.Y. C.P.L.R. 901(b) does not preclude federal courts sitting in diversity from hearing class actions seeking state statutory penalties under Federal Rule of Civil Procedure 23).

99. *See Baker*, 554 U.S. at 491 (distinguishing common law punitive damages as "untethered to strict numerical multipliers" of statutes); 1 DOBBS, *supra* note 66, § 3.12, at 543 n.17 (explaining that extrastatutory punitive awards are "largely discretionary").

100. 1 DOBBS, *supra* note 66, § 3.12, at 543.

Statutory multiple damages can also serve "entirely non-punitive purposes."[101] Some provide liquidated damages for actual losses that are difficult to prove or otherwise unrecognized by the law.[102] Others may induce private enforcement of matters of public importance, which might otherwise remain financially unattractive causes of action.[103]

When it comes to characterizing the nature of statutory multiple damages, the presence of a "willfulness" or a similar scienter requirement is often a key distinction between punitive and compensatory provisions.[104] The word "willful," although "widely used in the law," lacks a clear definition and is "generally understood to refer to conduct that is not merely negligent."[105] As the U.S. Supreme Court recently observed, "scienter requirements are typical of punitive statutes, because [legislatures] often wish[] to punish only those who intentionally break the law."[106] Generally, multiple damages conditioned upon "serious wrongdoing" will appear punitive, and those providing a 'liquidated' award compensatory.[107] The

101. *Id.*

102. *See id.* (citing United States v. Bornstein, 423 U.S. 303 (1976) and Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942)); *see also supra* Part I.B.2 (describing "liquidated damages").

103. *See Baker*, 554 U.S. at 494–95, 511 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979), which observes, "Congress created the treble-damages remedy of § 4 [of the Clayton Act] precisely for the purpose of encouraging *private* challenges to antitrust violations" to "provide a significant supplement to the limited resources available" for official enforcement); 1 DOBBS, *supra* note 66, § 3.12, at 543–44 (citing Agency Holding Corp. v. Malley-Duff & Assocs., Inc. 483 U.S. 143 (1987)).

104. *See generally* 1 DOBBS, *supra* note 66, § 3.11(2), at 468–75 (discussing the role a defendant's culpable state of mind often plays in punitive statutes).

105. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 135 (1988) (interpreting "willful" as used in the FLSA's statute of limitations as knowledge or reckless disregard); *see also* Walton v. United Consumers Club, 786 F.2d 303, 308–09 (7th Cir. 1986) ("Wilfulness is a weasel word denoting a range of culpability from gross negligence to actual knowledge plus malice, depending on the context. Usually it denotes some highly culpable mental state either actual knowledge that one's acts violate the law or reckless indifference to the law." (citation omitted)); BLACK'S LAW DICTIONARY, *supra* note 67, at 1737 ("[Willful means v]oluntary and intentional, but not necessarily malicious."); *id.* ("[Willfulness is] 1. The fact or quality of acting purposely or by design; deliberateness; intention. Willfulness does not necessarily imply malice, but it involves more than just knowledge. 2. The voluntary, intentional violation or disregard of a known legal duty.").

106. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2595 (2012). In *National Federation of Independent Business v. Sebelius*, the Court differentiated between taxes and penalties, following the "functional approach" of *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36–37 (1922). *See NFIB*, 132 S. Ct. at 2595–96. "[T]hree practical characteristics" convinced the *Bailey* Court that a purported tax on child labor was actually a penalty: (1) the burden imposed was "exceedingly heavy"; (2) only those who "knowingly" violated the law had to pay; and (3) enforcement was by the Department of Labor, "an agency responsible for punishing violations of labor laws, not collecting revenue." *Id.*

107. 1 DOBBS, *supra* note 66, § 3.12, at 544 (citing 15. U.S.C.A. § 117 and 29 U.S.C.A. § 216(a)); 1 SCHLUETER, *supra* note 90, § 2.1(B), at 25–28 (describing the important role culpability requirements play when identifying statutory multiple damages provisions as punitive or nonpunitive).

absence of a willfulness or scienter requirement, however, will not necessarily disqualify a punitive characterization.[108]

### *C. Statutory Construction*

Issues of statutory construction lie at the heart of this Note. After introducing relevant principles of New York statutory construction, this section examines leading decisions coloring the "purpose" or "nature" of the FLSA and of the 1967 Version's liquidated damages provisions.

#### 1. Principles of New York Statutory Construction

In New York, legislative intent is the "great and controlling principle" in statutory construction,[109] and statutory text is the primary source of legislative intent.[110] The text of a multiple damages provision, however, might not unambiguously suggest either a compensatory or a punitive purpose. When statutory text is unclear, courts may attempt to divine legislative intent from extrinsic sources, such as legislative history.[111] Such sources can help courts determine how the legislature intended to "suppress the evil and advance the remedy" of a particular "mischief,"[112] or further the general underlying "object, spirit and purpose of the statute."[113]

108. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (finding that a multiple damages provision lacking a culpability requirement in the Jones Act was not "merely" or "exclusively" compensatory, since the legislature had also designed it "to prevent, by its coercive effect" delayed payments to seamen).

109. N.Y. Post Corp. v. Leibowitz, 143 N.E.2d 256, 260 (N.Y. 1957) (quoting People v. Ryan, 8 N.E.2d 313, 315 (N.Y. 1937)); *see also* N.Y. STAT. LAW §§ 92, 191 (McKinney 1971); Albany Law Sch. v. Office of Mental Retardation & Dev. Disabilities, 968 N.E.2d 967, 974 (N.Y. 2012) ("In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention.").

110. *See* N.Y. STAT. LAW §§ 76, 94 ("The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction."); *Albany Law Sch.*, 968 N.E.2d at 974 ("As we have repeatedly stated, the text of a provision 'is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning.'" (quoting DaimlerChrysler Corp. v. Spitzer, 860 N.E.2d 705, 708 (N.Y. 2006)); Samiento v. World Yacht Inc., 883 N.E.2d 990, 993–94 (N.Y. 2008); Dep't of Welfare v. Siebel, 161 N.E.2d 1, 5 (N.Y. 1959) ("Legislative intent is to be determined primarily from the language used in the act under consideration.").

111. *See* N.Y. STAT. LAW §§ 76, 120–25, 191; *Albany Law Sch.*, 968 N.E.2d at 974 ("[W]e should inquire into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history.") (internal quotation marks omitted); Young v. Town of Huntington, 388 N.Y.S.2d 978, 981–82 (Sup. Ct. Suffolk County 1976) (observing that courts may look to "legislative history, the circumstances surrounding the statute's passage, the general spirit and purpose underlying the enactment, the recitals in the statute's preamble, and the statements of the statute's draftsmen" (citations omitted)); STEVEN M. BARKAN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 8 (9th ed. 2009).

112. N.Y. STAT. LAW § 95.

113. *Id.* § 96.

Generally, legislative history is comprised of documents reflecting the information that lawmakers considered before enacting the legislation.[114] Although Congress generates vast amounts of legislative history, state legislative history is typically sparse.[115] In New York, committee reports and debate records are rare; all the courts typically have to rely upon are governor's bill jackets.[116] Bill jackets cobble together assorted materials, which may include a sponsor's memorandum, constituents' letters concerning legislation awaiting the governor's signature, or a governor's statement approving or vetoing a bill—in other words, "[n]ot much of a window on legislative intent."[117]

Even when relevant materials are available, they deserve only "some weight in the absence of more definitive manifestations of legislative purpose" and "must be cautiously used."[118] A governor's statements may be examined in an analysis of legislative intent, but such statements "suffer from the same infirmities" as those that legislators make during floor debates—namely that "it is impossible to determine with certainty" whether an individual's views are attributable to an entire legislative body.[119]

In many instances, extrinsic aids for determining state legislative intent do not exist at all.[120] When federal laws are models for state laws, however, Congress's intent and the history of the federal laws may inform interpretations of the state laws, since the state legislature presumably had the same objectives where it employed similar terminology.[121] Uniform

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114. *See* BARKAN, *supra* note 111, at xxxii–iii, 157 (defining "legislative history" as documents and other materials providing "background information and insight into the purpose and intent of statutes"); *Legislative Intent*, N.Y. ST. LIBR., http://www.nysl.nysed.gov/legint.htm (last updated Jan. 16, 2013).

115. *See* BARKAN, *supra* note 111, at 207; Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 600 (1997); *Legislative Intent*, *supra* note 114.

116. *See* Kaye, *supra* note 115, at 600.

117. *See id.*; *Legislative Intent*, *supra* note 114. *See generally* ROBERT ALLAN CARTER, LEGISLATIVE INTENT IN NEW YORK STATE: MATERIALS, CASES AND ANNOTATED BIBLIOGRAPHY (2d ed. 2001) (surveying the research process for legislative intent in New York); William H. Manz, *If It's Out There: Researching Legislative Intent in New York*, 77 N.Y. ST. B. ASS'N J. 43 (2005) (same).

118. Majewski v. Broadalbin-Perth Cent. Sch. Dist., 696 N.E.2d 978, 981–82 (N.Y. 1998).

119. *Id.* at 982; *see* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 318 (1897) ("[I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other."); *see also* N.Y. STAT. LAW § 14 (McKinney 1971) ("The Governor's function in approving and disapproving bills submitted by the Legislature, as required by the [state's] Constitution, is legislative in nature."). In *Majewski v. Broadalbin-Perth Central School District*, the New York Court of Appeals rejected a governor's explicit statements that a statute should apply retroactively. *See* 696 N.E.2d at 984.

120. *See Legislative Intent*, *supra* note 114.

121. *See* N.Y. STAT. LAW § 262 ("In interpreting an ambiguous statute of New York, the court may consider the construction placed on a similar statute of another state or country by its courts."); H.O.M.E.S. v. N.Y. State Urban Dev. Corp., 418 N.Y.S.2d 827, 832 (App. Div.

construction is desirable, and federal constructions of federal laws are highly persuasive, yet they are not binding on state courts interpreting state laws.[122]

### 2. Construing FLSA Liquidated Damages As Compensatory and the Unavailability of Prejudgment Interest

Although 29 U.S.C. § 216 is entitled "Penalties," within five years of the FLSA's enactment, the Supreme Court ruled that the liquidated damages provision is compensatory in nature.[123] In *Overnight Motor Transportation Co. v. Missel*,[124] the Court rejected a due process challenge to § 216's mandatory liquidated damages provision.[125] The Court explained that regardless of an employer's good faith or reasonableness, the liquidated damages provision neither violates due process nor warrants shifting the burden of proof to employees who are "no more at fault than the employer."[126] The Court distinguished § 216's liquidated damages from the "threat of criminal proceedings," "prohibitive fines," and "double damages treated as penalties."[127] The Court also emphasized that § 216 provides "compensation, not a penalty or punishment," because wage underpayments "may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."[128]

A few years later, the Court reinforced *Missel*'s characterization of § 216's liquidated damages as compensatory.[129] In *Brooklyn Savings Bank v. O'Neil*,[130] the Court held that a plaintiff may not recover prejudgment

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4th Dep't 1979) ("Since the State law was modeled after the Federal law in this respect, for construction of the State law we look to the cases which have construed the [federal law].") (citations omitted); Young v. Town of Huntington, 388 N.Y.S.2d 978, 981 (Sup. Ct. Suffolk County 1976); Sterling Factors Corp. v. Sad Sam's Furnitureland of Binghamton, Inc., 195 N.Y.S.2d 55, 58–59 (Sup. Ct. Broome County 1960) (considering the legislative history of other states' statutes, upon which a contested statute was modeled).

122. *See In re* Lazarus, 52 N.Y.S.2d 682, 687 (App. Div. 3d Dep't 1944) ("While Federal statutes and decisions are not binding on us, they are highly persuasive and uniformity in interpretation is desirable."), *aff'd*, 64 N.E.2d 169 (N.Y. 1945); Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater N.Y., 28 N.Y.S.2d 594 (App. Div. 1st Dep't 1941), *rev'd on other grounds*, 43 N.E.2d 820 (N.Y. 1942); People *ex rel.* Mosbacher v. Graves, 5 N.Y.S.2d 553, 555 (App. Div. 3d Dep't 1938) ("It is apparent that this state statute was copied verbatim from the federal, thus indicating a strong legislative intent for uniformity in interpretation."), *aff'd*, 19 N.E.2d 89 (N.Y. 1939); *Young*, 388 N.Y.S.2d at 978.

123. *See* 29 U.S.C. § 216 (2006) (entitled "Penalties"); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583–84 (1942) (determining that the FLSA's liquidated damages are compensatory); *see also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999), *modified*, Zheng v. Liberty Apparel Co., 355 F.3d 61 (2d Cir. 2003).

124. 316 U.S. 572 (1942).

125. *See id.* at 583.

126. *Id.* at 582–84.

127. *Id.*

128. *Id.*; *see also supra* notes 87–88, 102, 107 and accompanying text.

129. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707–08, 715 (1945).

130. *See id.*

interest in addition to § 216 liquidated damages.[131] The Court reiterated that an employee's actual injuries may be "too obscure and difficult of proof for estimate"[132] and added that § 216's liquidated damages compensate employees "for delay in payment."[133] The Court emphasized Congress's concerns for low-wage employees, who, "receiving less than the statutory minimum[,] are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid."[134] Consequently, underpaid minimum wages or overtime compensation "may be so detrimental" to these vulnerable workers "that double payment must be made in the event of delay in order to insure *restoration* of the worker to that minimum standard of well-being."[135] The Court concluded that layering prejudgment interest upon liquidated damages would be "inconsistent with Congressional intent," since Congress had already "seen fit to fix the sums recoverable for delay."[136] In sum, combining prejudgment interest with the FLSA's liquidated damages would produce an impermissible double recovery.[137]

In the wake of *Brooklyn Savings Bank*, Congress amended the FLSA, granting district courts discretion to reduce or deny liquidated damages where an employer demonstrates a reasonable, good-faith attempt to comply with the FLSA.[138] As a result, some workers might not receive any

131. *Id.* at 714–16; 2 KEARNS, *supra* note 8, at 18-164.

132. *Brooklyn Sav. Bank*, 324 U.S. at 707 (citing Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942)).

133. *Id.* at 715 (noting that § 216(b) "authorizes the recovery of liquidated damages as compensation for delay in payment of sums due under the [FLSA]"); *see also* 2 KEARNS, *supra* note 8, at 18-164 (citing *Brooklyn Sav. Bank*, 324 U.S. 697); Carrasco v. W. Vill. Ritz Corp., No. 11 Civ. 7843, 2012 WL 3822238, at *2 (S.D.N.Y. Sept. 4, 2012) (citing Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999)).

134. *Brooklyn Sav. Bank*, 324 U.S. at 708; *see also* Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 57–58 (2d Cir. 1984) ("The award of interest [in a § 217 case] is especially appropriate for wage earners, who ordinarily do not have access to resources other than their wages to meet the necessities of daily living.").

135. *Brooklyn Sav. Bank*, 324 U.S. at 707–08 (emphasis added) (citing 29 U.S.C. § 202(a) (1940)); *see also supra* note 33 and accompanying text.

136. *Brooklyn Sav. Bank*, 324 U.S. at 715.

137. *See id.* at 715–16 ("To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages."); *see also supra* Part I.B.1. As a corollary, prejudgment interest *is* available in § 217 actions, where liquidated damages are *not* authorized. *Compare* 29 U.S.C. § 216 (2006), *with id.* § 217. In *Brock v. Superior Care, Inc.*, the Second Circuit upheld the Secretary of Labor's entitlement to collect unpaid overtime wages on behalf of employees, but disallowed liquidated damages because § 217 does not authorize them. Brock v. Superior Care, Inc., 840 F.2d 1054, 1064–65 (2d Cir. 1988). On motion for clarification, the court permitted an award of prejudgment interest, because "[o]nce we have disallowed liquidated damages [in a § 217 action], there is no reason to deny the Secretary the opportunity to collect prejudgment interest, which is normally awarded in FLSA suits in the absence of liquidated damages." *Id.* at 1064; *see also Donovan*, 726 F.2d at 57–58 (awarding prejudgment interest in a § 217 action).

138. *See* Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262) (providing the good-faith defense codified at 29 U.S.C. § 260); Trans

liquidated damages as compensation for delay. The availability of a good-faith defense, however, has not deterred the Second Circuit from following *Brooklyn Savings Bank*'s characterization of § 216's liquidated damages as compensatory, rather than punitive.[139] As the court asserted, "[t]he possibility that a judge may in narrow circumstances relieve an employer of its obligation to pay alters neither Section 216's general command that liquidated damages be paid nor our *repeated recognition that these damages count as compensation*."[140]

### 3. Construing NYLL Liquidated Damages As Punitive and the Availability of Prejudgment Interest

The punitive nature of NYLL liquidated damages derives from *Carter v. Frito-Lay, Inc.*[141] In a two-page opinion, the New York Appellate Division, First Department, concluded that New York's Civil Procedure Law and Rule 901(b) prohibits class recovery of liquidated damages under the 1967 Version, because such damages constitute a "penalty."[142] The court provided two reasons for rejecting arguments that the 1967 Version's liquidated damages constituted purely additional compensation.[143] First, the court relied on the 1967 Version's text, observing that recovery is "expressly conditioned on a finding of willful conduct on the part of the employer."[144] Second, the court cited the statute's legislative history, specifically characterizing a memorandum that Governor Nelson A. Rockefeller issued upon signing the 1967 Version into law as "pointedly refer[ing]" to a deterrent and retributive scheme.[145] The court quoted the memorandum, stating that the provision is a "stronger sanction against an employer for willful failure to pay wages . . . [and] should result in greater compliance with the law."[146] The court concluded, "It is clear that liquidated damages as provided in this statute, and especially as viewed in

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World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985); *see also supra* notes 39–46 and accompanying text.

139. *See* United States v. Sabhnani, 599 F.3d 215, 260 (2d Cir. 2010) ("As we have said with regard to FLSA's liquidated damages provision in the past, '[l]iquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving wages due caused by the employer's violation of the FLSA.'" (alteration in original) (quoting Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999))), *cert. denied*, 131 S. Ct. 1000 (2011); Reich v. S. New Eng. Telecomms. Corp., 121 F.3d 58, 71 (2d Cir. 1997).

140. *Sabhnani*, 599 F.3d at 260 (emphasis added).

141. 425 N.Y.S.2d 115, 116 (App. Div. 1st Dep't 1980), *aff'd*, 419 N.E.2d 1079 (N.Y. 1981).

142. *See id.*

143. *See id.*

144. *Id.* Here, the court's reasoning parallels the Supreme Court's in *Trans World Airlines, Inc. v. Thurston*, 411 U.S. 111 (1985), where the Court relied upon a willfulness requirement to distinguish a "punitive" liquidated damages provision from the FLSA's compensatory provision. *Id.* at 125–28. For a discussion of *Thurston*, see *infra* Part II.B.

145. *Carter*, 425 N.Y.S.2d at 116.

146. *See id.* (alterations in original) (quoting Administration Memorandum, *reprinted in* 1967 N.Y. ST. LEGIS. ANN. 184).

this context, constitute a penalty."[147] In a two-sentence opinion, the New York Court of Appeals affirmed the decision "for reasons stated in the memorandum at the Appellate Division."[148]

The New York Court of Appeals separately discussed the legislative history of the 1967 Version in *Gottlieb v. Kenneth D. Laub & Co.*,[149] where the court held that section 198(1-a) does not apply to a common law breach of contract claim.[150] Based on materials in the bill jacket, *Gottlieb* concluded that supporters of the 1967 Version treated all of the remedies in section 198 as "addressing the same problem (i.e., employers' violation of the wage laws), having the same objective (enhancing enforcement of the Labor Law's substantive wage enforcement provisions), and providing cumulative remedies for wage claims brought thereunder."[151] The court cited NYDOL's supporting memorandum, which, according to the court, frames the bill's "sole" purpose as "[t]o assist the enforcement of the wage payment and minimum wage payment laws by imposing greater sanctions on employers for violation of those laws."[152] The court also cited a memorandum from the state AFL-CIO, which characterizes section 198(1-a)'s provisions for attorney's fees and liquidated damages collectively as "one more safeguard to assure employees of proper payment of wages *under the law* and would thus be a *deterrent* against abuses and violations."[153]

*Carter* laid the foundation for the Second Circuit's decision in *Reilly v. NatWest Markets Group Inc.*,[154] which held that an employee may recover state prejudgment interest in addition to the 1967 Version's liquidated damages for the same underlying wage.[155] NatWest had argued that Reilly's state liquidated damages award should obviate additional state prejudgment interest.[156] NatWest's position relied upon *In re CIS Corp.*,[157] in which a bankruptcy court declined to award prejudgment interest because NYLL liquidated damages "are in the nature of compensation for the lost use of wages . . . [and] are the functional equivalent of pre-judgment interest. [Awarding both] would provide [the plaintiff] redress twice for the

147. *Id.*
148. Carter v. Frito-Lay Inc., 419 N.E.2d 1079, 1079 (N.Y. 1981).
149. 626 N.E.2d 29 (N.Y. 1993).
150. *See id.*
151. *Id.* at 33.
152. *Id.* (emphasis omitted) (quoting Memorandum from Indus. Comm'r (Apr. 5 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 4).
153. *Id.* (second emphasis added) (quoting Memorandum from N.Y. State AFL-CIO, *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 11).
154. 181 F.3d 253 (2d Cir. 1999).
155. *See id.* at 265; *see also, e.g.*, Janus v. Regalis Constr., Inc., No. 11-CV-5788, 2012 WL 3878113, at *8 (E.D.N.Y. July 23, 2012) (following *Reilly*'s approach to prejudgment interest), *report and recommendation adopted*, 2012 WL 3877963 (E.D.N.Y. Sept. 4, 2012). *Reilly* does not mention *Gottlieb* at all. *See* Mark Walfish & Adrienne B. Koch, *Awarding Attorneys' Fees and Liquidated Damages*, 223 N.Y. L.J. 1 (2000) ("No reference to *Gottlieb* is contained in the [*Reilly*] court's opinion.").
156. *Reilly*, 181 F.3d at 265.
157. 206 B.R. 680 (Bankr. S.D.N.Y. 1997).

same loss."[158] However, the *Reilly* court found the bankruptcy court's reasoning "unpersuasive."[159] Because of *Carter*'s determination that "liquidated damages under [section 198(1-a)] 'constitute a penalty' to deter an employer's willful withholding of wages," the Second Circuit concluded that the 1967 Version's liquidated damages were exclusively punitive in nature.[160] The court permitted Reilly to recover both state liquidated damages and state prejudgment interest, because the awards "serve fundamentally different purposes" and are not "functional equivalents."[161]

## II. THE QUAGMIRE: THE UNDERLYING INTRACIRCUIT SPLIT AND THE CONFLICTING SIGNALS THE 2009 AND 2010 AMENDMENTS SEND

Although *Reilly* addressed the intersection of state prejudgment interest and state liquidated damages, that decision came to serve as the basis for an intracircuit split over whether plaintiffs may, under the 1967 Version, recover both FLSA and NYLL liquidated damages upon the same unpaid wages (i.e., 125 percent liquidated damages). Courts awarding recovery under both statutes reasoned that each liquidated damages provision served a different purpose, so no double recovery occurred.[162] Other courts adopted the position that the FLSA and NYLL's liquidated damages provisions remedied the same harms or accomplished the same practical purposes, so awarding both would offend double recovery.[163]

Before the Second Circuit addressed the split, the state legislature amended section 198(1-a) twice.[164] In light of these amendments, a new analysis is necessary to guide courts facing demands for both state and federal liquidated damages on the same underlying wage. *Reilly* was decided a decade before these amendments drastically changed the statute's text. The Second Circuit and the New York Court of Appeals have

158. *Id.* at 690; *Reilly*, 181 F.3d at 265.

159. *Reilly*,181 F.3d at 265.

160. *Id.*

161. *Id.*; *see also* Janus v. Regalis Constr., Inc., No. 11-CV-5788, 2012 WL 3878113, at *8 (E.D.N.Y. July 23, 2012), *report and recommendation adopted*, 2012 WL 3877963 (E.D.N.Y. Sept. 4, 2012); Maldonado v. La Nueva Rampa, Inc., No. 10 Civ. 8195, 2012 WL 1669341, at *11 (S.D.N.Y. May 14, 2012); *supra* Part I.B.2 (discussing prejudgment interest's compensatory nature).

162. *See, e.g.*, Gunawan v. Sake Sushi Rest., No. 09-CV-5018, 2012 WL 4369754, at *9 (E.D.N.Y. Sept. 24, 2012) ("[T]he two statutory provisions serve different purposes and are therefore not mutually exclusive."); Santillan v. Henao, 822 F. Supp. 2d 284, 297 (E.D.N.Y 2011) ("Because each award serves fundamentally different purposes, plaintiff may be granted both awards."); Wicaksono v. XYZ 48 Corp., No. 10 Civ. 3635, 2011 WL 2022644, at *7 (S.D.N.Y. May 2, 2011); Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 261–62 (S.D.N.Y. 2008).

163. *See, e.g.*, Greathouse v. JHS Sec., Inc., No. 11 Civ. 7845, 2012 WL 3871523, at *7 (S.D.N.Y. Sept. 7, 2012); *Janus*, 2012 WL 3878113, at *8; Drozd v. Vlaval Constr., Inc., No. 09 CV 5122, 2011 WL 9192036, at *15 n.19 (E.D.N.Y. Oct. 18, 2011), *report and recommendation adopted*, 2012 WL 4815639 (E.D.N.Y. Oct. 10, 2012).

164. *See* Wage Theft Prevention Act of 2010, ch. 564, § 7, 2010 N.Y. Laws 1446, 1450–51; Act of Aug. 26, 2009, ch. 372, § 1, 2009 N.Y. Laws 1086, 1086.

acknowledged the amendments, but neither has interpreted them.[165] Of course, a judicial determination of legislative purpose is a prerequisite to the "different purposes" analysis. As discussed in this part, only a handful of district courts have recognized the need for fresh analysis. Others continue to apply interpretations of the 1967 Version to the amended text.[166]

This part begins by supplementing the discussions in *Carter* and *Gottlieb* regarding the 1967 Version's legislative history.[167] Then, it presents the changes that the 2009 and 2010 Amendments' wrought upon section 198(1-a) and provides evidence of the state legislature's motivations for enacting those amendments.

### *A. Revisiting the 1967 Version's Legislative History*

Nothing in *Reilly* suggests that the Second Circuit independently examined the legislative history underlying *Carter*'s decision. In fact, the very same governor's memorandum upon which *Carter* relies explicitly asserts that the 1967 Version's liquidated damages would "compensate the employee for the loss of the use of the money to which he was entitled."[168] *Carter* omits this language from its quotation, although it is in the memorandum's next sentence.[169]

Governor Rockefeller's memorandum echoed statements other interested parties expressed before the 1967 Version became law—statements which the *Carter* and *Gottlieb* analyses both omit.[170] Such statements are memorialized in the 1967 Version's bill jacket, which contains not only the governor's memorandum but also numerous other submissions.[171] For example, the sponsor's memorandum explains that liquidated damages

165. *See* Kuebel v. Black & Decker, Inc., 643 F.3d 352, 366 n.9 (2d Cir. 2011); Ryan v. Kellogg Partners Institutional Servs., 968 N.E.2d 947, 952 n.8 (N.Y. 2012).

166. *See, e.g.*, Garcia v. Giorgio's Brick Oven & Wine Bar, No. 11 Civ. 4689, 2012 WL 3339220, at *4–5 (S.D.N.Y. Aug. 15, 2012) (relying on cases interpreting the 1967 Version to support a "different purposes" analysis applied to the current statutory text), *report and recommendation adopted*, 2012 WL 3893537 (S.D.N.Y. Sept. 7, 2012); Angamarca v. Pita Grill 7 Inc., No. 11 Civ. 7777, 2012 WL 3578781, at *8 (S.D.N.Y. Aug. 2, 2012) (same).

167. For discussions of *Carter* and *Gottlieb*, see *supra* Part I.C.3.

168. Memorandum from Governor Nelson A. Rockefeller (Apr. 18, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 14.

169. Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116 (App. Div. 1st Dep't 1980) (quoting Administration Memorandum, *reprinted in* 1967 N.Y. ST. LEGIS. ANN. 184), *aff'd*, 419 N.E.2d 1079 (N.Y. 1981); *see also* Memorandum from Governor Nelson A. Rockefeller (Apr. 18, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 14.

170. *See* N.Y. Bill Jacket 1967, ch. 310. For discussions of *Carter* and *Gottlieb*, see *supra* Part I.C.3.

171. The relevant bill jacket contains a more comprehensive collection of materials than the *1967 New York State Legislative Annual*, which *Carter* cites. *Compare* N.Y. Bill Jacket 1967, ch. 310, *with* 1967 N.Y. ST. LEGIS. ANN. 184; *see also Carter*, 425 N.Y.S.2d at 116 (citing 1967 N.Y. ST. LEGIS. ANN. 184, but not the bill jacket).

would serve both punitive and compensatory purposes.[172] First, as "stronger sanctions," they would result in "greater compliance with the law."[173] Second, they would "compensate the employee for the loss of the use of the money to which he was entitled."[174] Similarly, the Division of Budget observed that liquidated damages would both "improve compliance" and "repay workers for a good deal of anguish, time and money."[175] Furthermore, NYDOL, the agency responsible for enforcing the NYLL, also commented on the provision's dual purposes.[176] NYDOL's memorandum justified liquidated damages as both a way to "impos[e] greater sanctions" against violators and a way to compensate underpaid workers while avoiding complicated back pay calculations.[177]

### *B. The Importance of "Willfulness" or Similar Scienter Requirements*

In addition to legislative history, *Carter* rests upon the 1967 Version's text—namely its explicit inclusion of a "willfulness" requirement.[178] The 2009 Amendment eliminated that requirement.[179] Now, the NYLL, like the FLSA, presumes liquidated damages are available unless an employer can establish a good-faith defense.[180] The following discussion explores the roles scienter requirements played in three U.S. Supreme Court opinions interpreting analogous statutory multiple damages provisions.

In *Trans World Airlines, Inc. v. Thurston*,[181] the Supreme Court addressed whether the Age Discrimination in Employment Act's[182]

172. *See* Letter from Assemblyman Frank A. Carroll to Robert R. Douglass, Counsel to Governor Nelson A. Rockefeller (Mar. 31, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 2–3.

173. *Id.* at 3; Memorandum from Governor Nelson A. Rockefeller (Apr. 18, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 14.

174. Letter from Assemblyman Frank A. Carroll to Robert R. Douglass, Counsel to Governor Nelson A. Rockefeller (Mar. 31, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 3; Memorandum from Governor Nelson A. Rockefeller (Apr. 18, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 14.

175. Budget Report on Bills (Apr. 6, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 6.

176. *See* Memorandum from Indus. Comm'r (Apr. 5, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 4–5.

177. *See id.* (observing that the "bill follows the example of the Federal Fair Labor Standards Act in providing an easily-calculable formula for liquidated damages" and that liquidated damages will "also compensate the employee for the loss of the use of the money"). *Gottlieb*'s discussion of NYDOL's memorandum omits this language. *See* Gottlieb v. Kenneth D. Laub & Co., 626 N.E.2d 29, 33 (N.Y. 1993); *see also supra* note 152 and accompanying text.

178. *See* Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116 (App. Div. 1st Dep't 1980), *aff'd*, 419 N.E.2d 1079 (N.Y. 1981).

179. *See* Act of Aug. 26, 2009, ch. 372, § 1, 2009 N.Y. Laws 1086, 1086.

180. The FLSA's defense provision also explicitly requires reasonableness, while the NYLL's does not. *Compare* 29 U.S.C. § 260 (2006), *with* N.Y. LAB. LAW § 198(1-a) (McKinney Supp. 2013). As Judge Frank H. Easterbrook quipped, "[a] good heart but an empty head does not produce a defense" under § 260. Walton v. United Consumers Club, 786 F.2d 303, 312 (7th Cir. 1986).

181. 469 U.S. 111 (1985).

182. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

(ADEA) inclusion of a willfulness requirement distinguished its liquidated damages provision from the FLSA's.[183] Congress passed the ADEA in 1967 as an amendment to the FLSA.[184] Section 7(b) of the ADEA was modeled on and explicitly incorporates the FLSA's liquidated damages provision, but limits such awards to "cases of willful violations."[185] The Court, recognizing Congress's familiarity with the FLSA's provisions and with judicial interpretations of them, held that Congress intended the ADEA's liquidated damages to be punitive in nature, because the willfulness proviso "significantly" distinguished the ADEA's provision from the FLSA's.[186] Consequently, the ADEA's liquidated damages are only available for violations when an employee demonstrates an employer's knowledge of or reckless disregard for the law.[187]

After *Thurston*, an intercircuit split arose over whether ADEA liquidated damages displaced prejudgment interest, or whether they were "strictly punitive" and prejudgment interest could supplement them.[188] The Second Circuit, following *Thurston*'s characterization of the ADEA's liquidated damages as punitive, reasoned that prejudgment interest and ADEA liquidated damages serve different purposes, so both can be recovered on the same wage claim.[189]

Subsequently, in *Commissioner v. Schleier*,[190] the Supreme Court reiterated the importance of the "willfulness" distinction between FLSA and

183. *See Thurston*, 469 U.S. at 111.

184. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 614 (1993); *Thurston*, 469 U.S. at 125–26; 1 KEARNS, *supra* note 8, at 1-26.

185. 29 U.S.C. § 626(b). Section 7(b) provides that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in . . . § 216 (except for subsection (a) thereof)" and that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter." *Id.*; *see also Biggins*, 507 U.S. at 606; *Thurston*, 469 U.S. at 125 (citing Lorillard v. Pons, 434 U.S. 575, 579 (1978)); *Walton*, 786 F.2d at 308.

186. *Thurston*, 469 U.S. at 125 ("Moreover, § [2]16(b) of the FLSA, which makes the award of liquidated damages mandatory, is *significantly qualified* in ADEA § 7(b) by a proviso that a prevailing plaintiff is entitled to double damages 'only in cases of willful violations.'" (emphasis added) (quoting 29 U.S.C. § 626(b))).

187. 29 U.S.C. § 626(b); *Thurston*, 469 U.S. at 126. The Court reaffirmed *Thurston*'s "willfulness" standard in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), which interpreted "willful" in the FLSA's statute of limitations as consistent with the *Thurston* standard of knowledge or reckless disregard. *Id.* at 133; *see also Biggins*, 507 U.S. at 614–15 (observing *McLaughlin*'s reaffirmation of *Thurston*).

188. *See, e.g.*, Downey v. Comm'r, 33 F.3d 836, 839–40 (7th Cir. 1994) (surveying the split).

189. *See* Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 282 (2d Cir. 1987) ("[P]rejudgment interest does not provide a double recovery to victims of age discrimination who have proven their entitlement to liquidated damages as well as back pay."); *see also* Chandler v. Bombardier Capital, Inc., 44 F.3d 80, 83–84 (2d Cir. 1994) (following *Reichman*).

190. 515 U.S. 323 (1995).

ADEA liquidated damages.[191] In *Schleier*, the Court rejected Schleier's argument that Congress intended "liquidated damages under the ADEA serve, at least in part, to compensate plaintiffs for personal injuries that are difficult to quantify" by incorporating the FLSA's liquidated damages provision.[192] The Court acknowledged that portions of the ADEA's legislative history supported Schleier's position.[193] Nonetheless, the Court invoked precedent: "We have already concluded that the liquidated damages provisions of the ADEA were a *significant departure* from those in the FLSA, and we explicitly held in *Thurston*: 'Congress intended for liquidated damages to be punitive in nature.'"[194] The Court stressed the importance of the willfulness requirement, explaining that, "[i]f liquidated damages were designed to compensate ADEA victims, we see no reason why the employer's knowledge of the unlawfulness of his conduct should be the determinative factor in the award of liquidated damages."[195]

On the other hand, the Court does not always condition a punitive characterization upon the inclusion of a willfulness or scienter requirement. In *Griffin v. Oceanic Contractors, Inc.*,[196] a seaman sued his former employer for unpaid wages and penalties under the Jones Act, which the Court explained had authorized seamen who were not paid promptly upon discharge to recover "two days' pay for each and every day" of delay in which a shipmaster or owner "refuses or neglects to make payment . . . without sufficient cause."[197] The district court, in its discretion, had reduced the time period in which Griffin's overdue wages remained outstanding, ultimately calculating a penalty of $6,881.60.[198] Griffin appealed, arguing that a literal application of the statute precluded such discretion and that he should have received over $300,000 because of the $412.50 in wages Oceanic had withheld.[199] Oceanic responded that the statute served remedial and compensatory purposes, so the award Griffin sought was "so far in excess of any equitable remedy as to be punitive."[200] Agreeing with Oceanic, the Court observed that it was "highly probable" that the damages Griffin sought would "greatly exceed[] any actual injury"

191. *See id.* at 326 ("[U]nlike the FLSA, the ADEA specifically provides that 'liquidated damages shall be payable only in cases of willful violations of this chapter.'" (quoting 29 U.S.C. § 626(b) and *Thurston*, 469 U.S. at 125)).

192. *Schleier*, 515 U.S. at 331.

193. *See id.* at 331–32.

194. *Id.* (emphasis added) (citations omitted). The Court observed that *Thurston* already had considered the legislative history pertaining to the liquidated damages' compensatory effects but had not found it persuasive. *See id.* at 332 n.5.

195. *Id.* at 332 n.5. The Court did not address the effect that the availability of a good-faith defense has upon this logic. *Cf.* United States v. Sabhnani, 599 F.3d 215, 260 (2d Cir. 2010) (explaining that the availability to employers of a good-faith defense which could deprive employees of liquidated damages does not affect the compensatory nature of FLSA liquidated damages); *see also supra* notes 139–40 and accompanying text.

196. 458 U.S. 564 (1982).

197. *Id.* at 570.

198. *See id.* at 568.

199. *See id.* at 568, 574–75.

200. *Id.* at 571.

the delayed payment had caused.[201] Still, the Court ruled for Griffin, because the statutory awards were not "merely" or "exclusively" compensatory, but also punitive since Congress had designed the statute "to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."[202]

Aside from eliminating the willfulness requirement, nothing in the text or legislative history of the 2009 or the 2010 Amendments suggests that the New York legislature intended to change the punitive gloss that courts, like *Reilly*, had assigned to section 198(1-a)'s liquidated damages provision. Then again, nothing acknowledges that gloss in the first place.[203] Rather, the 2009 Amendment was introduced at the request of NYDOL to "expand worker protections and remedies against employers who violate Labor Law requirements related to wage payment."[204] The bill raised section 215's penalties, untouched since the 1960s, but the amount of liquidated damages available to employees under section 198(1-a) remained at 25 percent.[205] Instead, as the bill's sponsor and NYDOL both explained, the bill shifted section 198(1-a)'s burden of proof to eliminate the "inherent unfairness" of requiring an employee to shoulder the "onerous burden" of demonstrating that an employer's violation was willful to obtain liquidated damages.[206] The bill's sponsor expected primarily low-wage workers "struggling to support their families on the minimum wage" to benefit from this change.[207]

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201. *Id.* at 575.

202. *Id.* (quoting Collie v. Fergusson, 281 U.S. 52, 55–56 (1930)).

203. Nonetheless, legislators are presumably aware of existing judicial interpretations. *See* Schmidt v. Falls Dodge, Inc., 970 N.E.2d 399, 403 (N.Y. 2012) (Ciparick, J., dissenting) (observing that "the legislative history of a particular enactment must be reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with" and that settled interpretations become "as much a part of the enactment as if incorporated into the language of the act itself" (quoting Matter of Knight-Ridder Broad., Inc. v. Greenberg, 511 N.E.2d 1116, 1119 (N.Y. 1987)) (internal quotation marks omitted)).

204. *See* Letter from N.Y. State Dep't of Labor to Peter Kiernan, Counsel to Governor David A. Paterson (Aug. 4, 2009), *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 10.

205. *See* Act of Aug. 26, 2009, ch. 372, §§ 1–2, 2009 N.Y. Laws 1086, 1086–87; Letter from N.Y. State Dep't of Labor to Peter Kiernan, Counsel to Governor David A. Paterson (Aug. 4, 2009), *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 10–11. Floor debates in the state Assembly and Senate focused on the increased penalty provisions and availability of a good-faith defense for employers but reveal little about the issues this Note addresses. *See* N.Y. State Senate, Record of Proceedings 6547–51 (July 16, 2009) (Bill No. 6963) (remarks of Sen. Stephen M. Saland) (opposing the bill because statutory "penalties get increased rather dramatically without the benefit of the good-faith exception that's recognized for purposes of the liquidated damages"); N.Y. State Assembly, Record of Proceedings 268–71 (June 22, 2009) (Bill No. 6963) (remarks of Assemb. Kenneth P. Zebrowski) (responding to Assemblyman James D. Conte's questions about increased penalties and the good-faith defense).

206. Memorandum in Support of Legislation, *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 6; Letter from N.Y. State Dep't of Labor to Peter Kiernan, Counsel to Governor David A. Paterson (Aug. 4, 2009), *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 10–11.

207. Memorandum in Support of Legislation, *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 6.

### *C. The NYLL's Newfound Conformity with the FLSA*

In effect, the 2009 and 2010 Amendments conform the NYLL's liquidated damages provision to the FLSA's. Together, the amendments eliminated section 198(1-a)'s willfulness requirement, provided employers with a good-faith defense, and increased liquidated damages from 25 percent to 100 percent.[208]

Since the amendments' enactment, however, no court interpreting section 198(1-a) has acknowledged a legislative intent to attain any degree of conformity with federal law. Still, some courts have commented on the laws' effective convergence as impacting the analysis underlying the intracircuit split.[209] As Magistrate Judge James Orenstein remarked in dicta, "To the extent the federal and state statutes now provide for essentially identical remedies with respect to liquidated damages, it is harder to argue that they are designed to compensate a plaintiff for disparate harms."[210] Similarly, Magistrate Judge Gabriel W. Gorenstein has also observed that the federal and state provisions now address the same harms.[211] Finally, Magistrate Judge Andrew J. Peck found the arguments favoring a single set of liquidated damages "even more compelling" now that the NYLL's liquidated damages "mirror" the FLSA's.[212]

Although courts have not mentioned it, the legislative history does address the NYLL's conformity with the FLSA. In support of the 2009 Amendment, the sponsor's memorandum stated that the bill would

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208. *Compare* 29 U.S.C. §§ 216, 260 (2006), *with* N.Y. LAB. LAW § 198(1-a) (McKinney Supp. 2013).

209. For a brief discussion of the split, see *supra* notes 162–63 and accompanying text.

210. Gunawan v. Sake Sushi Rest., No. 09-CV-5018, 2012 WL 4369754, at *9 n.11 (E.D.N.Y. Sept. 24, 2012); Siemieniewicz v. CAZ Contracting Corp., No. 11-CV-0704, 2012 WL 5183375, at *12 n.9 (E.D.N.Y. Sept. 21, 2012), *report and recommendation adopted as modified*, 2012 WL 5183000 (E.D.N.Y. Oct. 18, 2012).

211. *See* Greathouse v. JHS Sec., Inc., No. 11 Civ. 7845, 2012 WL 3871523 (S.D.N.Y. Sept. 7, 2012) (awarding liquidated damages under only one statute because the federal and state awards address the same harms); Paz v. Piedra, No. 09 Civ. 03977, 2012 WL 121103, at *12 (S.D.N.Y. Jan. 12, 2012) (same). In both *Greathouse v. JHS Sec., Inc.* and *Paz v. Piedra*, Magistrate Judge Gorenstein cited *Chun Jie Yin v. Kim*, No. 07 CV 1236, 2008 WL 906736 (E.D.N.Y. Apr. 1, 2008), as supporting the proposition that the federal and state statutes both address the same harms. *See Greathouse*, 2012 WL 3871523, at *7; *Paz*, 2012 WL 121103 at *12. In *Kim*, however, Magistrate Judge Orenstein had applied the 1967 Version, under which New York still required willfulness. *See Kim*, 2008 WL 906736, at *4. Furthermore, Magistrate Judge Orenstein subsequently found error in his conclusion in *Kim*. *See Siemieniewicz*, 2012 WL 5183375, at *12 n.10. In any event, both the NYLL and the FLSA now award liquidated damages unless an employer establishes the good-faith defense. *Compare* 29 U.S.C. §§ 216, 260, *with* N.Y. LAB. LAW § 198(1-a).

212. *See* Li Ping Fu v. Pop Art Int'l Inc., No. 10 Civ. 8562, 2011 WL 4552436, at *5 n.9 (S.D.N.Y. Sept. 19, 2011). Judge Denise L. Cote adopted Magistrate Judge Peck's Report and Recommendation, as modified, on clear error review, because "courts in [the Second] Circuit are split as to whether a plaintiff may recover *both* federal and state liquidated damages for the same overtime violation." Li Ping Fu v. Pop Art Int'l, Inc., No. 10 Civ. 8562, 2011 WL 6092309, at *1 (S.D.N.Y. Dec. 7, 2011). As discussed in Part II.D, *infra*, Judge Cote's own analysis of the 2010 Amendment's legislative history in *McLean v. Garage Management Corp.*, No. 10 Civ. 3950, 2012 WL 1358739, *9–10 (S.D.N.Y. Apr. 19, 2012), suggests that she might reach a contrary conclusion.

"conform New York law to the Fair Labor Standards Act."[213] Similarly, NYDOL, the agency responsible for enforcement, submitted a memorandum reiterating the sponsor's observation.[214] The Legal Aid Society[215] and NELP[216] also submitted memoranda noting the state's step toward conformity with the FLSA.

In 2009, the state avoided full conformity with the FLSA.[217] Whatever reservations may have existed in 2009, however, were overcome by 2010, when the WTPA increased liquidated damages from 25 percent to 100 percent.[218] This time, however, neither the bill's sponsor, NYDOL, nor the governor mentioned conformity with the FLSA.[219] Nevertheless, interested third parties noted the effect. For example, the Legal Aid Society observed, "Damages owed, on top of wages, will be increased from 25% to 100%—matching the damage level in twenty-four other States and *under federal law*."[220] Other parties making similar observations include Coalition for the Homeless,[221] Jobs with Justice,[222] and Make the Road.[223]

### *D. The Twin Goals of Deterrence and Retribution*

Before Governor Rockefeller signed the 1967 Version into law, constituents were already criticizing its weak enforcement scheme. For

213. Memorandum in Support of Legislation, *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 6.

214. *See* Letter from N.Y. State Dep't of Labor to Peter Kiernan, Counsel to Governor David A. Paterson (Aug. 4, 2009), *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 10–11.

215. *See* Letter from Legal Aid Soc'y to Peter Kiernan, Counsel to Governor David A. Paterson (Aug. 20, 2009), *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 22 ("[The bill] brings State law into conformance with existing federal protections which allow recovery of liquidated damages in all cases of wage underpayment unless the employer can demonstrate a good-faith belief that his or her underpayment was legal.").

216. Letter from Nat'l Emp't Law Project to Peter Kiernan, Counsel to Governor David A. Paterson (Aug. 17, 2009), *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 20 ("This proposal would take a first step toward making New York state law more consistent with federal law in awarding damages for minimum wage and overtime violations.").

217. *See* Memorandum in Support of Legislation, *reprinted in* N.Y. Bill Jacket 2009, ch. 372, at 6 ("The bill would not impact the 25 percent cap on liquidated damages allowed to New York employers, unlike many other jurisdictions that allow recovery of 100 percent liquidated damages.").

218. *See* Wage Theft Prevention Act of 2010, ch. 564, § 7, 2010 N.Y. Laws 1446, 1450.

219. *See* Introducer's Memorandum in Support (June 29, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 5–8; Letter from N.Y. State Dep't of Labor to Peter Kiernan, Counsel to Governor David A. Paterson (Dec. 10, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 9–10; Governor's Approval Memorandum, *reprinted in* 2010 N.Y. ST. LEGIS. ANN. 428–31.

220. *See* Letter from Legal Aid Soc'y to Governor David A. Paterson (Dec. 6, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 18 (emphasis added).

221. *See* Letter from Coal. for the Homeless to Governor David A. Paterson (Dec. 9, 2011), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 75. The letter appears misdated as 2011 because it advocates legislation enacted in 2010.

222. *See* Letter from Jobs with Justice to Governor David A. Paterson (Dec. 7, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 19.

223. *See* Letter from Make the Road to Governor David A. Paterson (Dec. 3, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 34.

example, although ultimately supporting enactment, the New York County Lawyers' Association complained that the bill's protections did not go far enough.[224] As the association explained, "The category of workers to whom these remedies are directed are notoriously low paid, and, the remedies, even as improved by the proposal, do not approach the potential of the remedies of the [FLSA] which allows up to 100% of liquidated damages."[225] Likewise, the New York State Bar Association Committee on Labor characterized the 25 percent liquidated damages as "minimal," since similar violations of federal law would lead to recovery of "an amount equal to the unpaid wages as liquidated damages."[226]

These concerns remained germane for decades. In 1997, New York passed the Unpaid Wages Prohibition Act,[227] which, inter alia, increased criminal penalties under section 198-a.[228] For repeat offenders, the act also authorized officials to collect a "sum as a civil penalty in an amount equal to double the total [wages] found to be due," while liquidated damages remained at 25 percent.[229] In a statement of purpose, the legislature lamented the continued "[e]xploitation of these most vulnerable workers," especially those in the garment and service industries.[230] It asserted, "The purpose of this legislation, therefore, is to provide [NYDOL] and working people with stronger and more varied tools with which to collect unpaid wages."[231] As the governor's memorandum explained, "Increasing the monetary penalties against dishonest employers will help deter wage law violations."[232] In 2009, the legislature once again increased penalties but not liquidated damages.[233]

The 2010 Amendment, however, increased section 198(1-a)'s liquidated damages for the first time in nearly forty-five years.[234] The WTPA's bill jacket brims with statements about the need to deter and punish wage and

224. *See* Letter from N.Y. Cnty. Lawyers' Ass'n to Governor Nelson A Rockefeller (Mar. 31, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 7–9. The association's comments specifically address section 2 of the bill regarding section 663 of the NYLL, but do not take a position on the identical provisions in section 1 of the bill regarding section 198(1-a) of the NYLL. *See id.*; *see also supra* note 9 (relating N.Y. LAB. LAW § 198(1-a) to § 663).

225. Letter from N.Y. Cnty. Lawyers' Ass'n to Governor Nelson A Rockefeller (Mar. 31, 1967), *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 9.

226. Memorandum from N.Y. State Bar Ass'n Comm. on Labor, *reprinted in* N.Y. Bill Jacket 1967, ch. 310, at 10.

227. ch. 605, § 5, 1997 N.Y. Laws 3392.

228. *See id.* It also amended Section 198(3) but left Section 198(1-a) unaffected. *See id.* § 4, 1997 N.Y. Laws at 3393.

229. *See id.* § 7, 1997 N.Y. Laws at 3393–94.

230. *See id.* § 1, 1997 N.Y. Laws at 3392–93.

231. *Id.*; *see also* Letter from Senator Carl L. Marcellino to Michael C. Finnegan, Counsel to Governor George E. Pataki (July 8, 1997), *reprinted in* N.Y. Bill Jacket 1997, ch. 605, at 7–8.

232. *See* Governor's Approval Memorandum, *reprinted in* N.Y. Bill Jacket 1997, ch. 605, at 6.

233. Act of Aug. 26, 2009, ch. 372, §§ 1–2, 2009 N.Y. Laws 1086, 1086–87; *see also supra* notes 204–07 and accompanying text (discussing the changes of 2009).

234. *See* Wage Theft Prevention Act of 2010, ch. 564, § 7, 2010 N.Y. Laws 1446, 1450.

hour violations.[235] The bill's sponsor criticized existing penalties as "minimal and offer[ing] little deterrent," but observed that this systemic shortcoming would "change dramatically," since "[p]enalties for violating employee rights would be increased in order to far better protect workers' rights and interests."[236]

Similarly, NYDOL noted that the WTPA contains "numerous provisions intended to deter and punish the nonpayment or underpayment of wages to employees . . . . [including] increases [in] penalties . . . ; [and] liquidated damages that will be payable to employees under certain circumstances from 25 to 100 percent of amounts owed."[237] NYDOL observed that the WTPA would benefit underpaid low-wage workers who are deprived of income for rent, groceries, heating, and their families' other basic needs, and who must rely on public assistance.[238] NYDOL believed the WTPA would both "create new deterrents" and help these aggrieved workers "seek redress."[239]

NYDOL urged the WTPA's enactment because the "[c]urrent penalties for wage theft are so low that there is a financial incentive to underpay workers."[240] As NELP explained, employers had little to lose, because the savings realized through underpayments "often outweigh the costs, even for those few who are apprehended."[241] NELP called upon the legislature to "up[] the ante"[242] for wage and hour violations "to better ensure compliance and deterrence."[243]

Other interested parties, such as the New York City Council,[244] Jobs with Justice,[245] the Legal Aid Society,[246] and Make the Road[247] also supported enactment, bemoaning the inadequacy of the existing enforcement scheme. As the Legal Aid Society stated, "noncompliance with the basic protections of New York Labor Law is often the norm, not the exception . . . . The

235. *See generally* N.Y. Bill Jacket 2010, ch. 564.

236. Introducer's Memorandum in Support (June 29, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 8.

237. Letter from N.Y. State Dep't of Labor to Peter Kiernan, Counsel to Governor David A. Paterson (Dec. 10, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 9.

238. *See id.* at 10.

239. *Id.*

240. *Id.* at 9.

241. BERNHARDT, *supra* note 3, at 52. As NELP explained, "When we talked to employers in low-wage industries, we heard over and over the calculus that results in wage theft: If you get caught, you basically just end up paying the wages you would have paid in the first place, so what's to lose?" Bernhardt, *supra* note 21.

242. Letter from Nat'l Emp't Law Project to Governor David A. Paterson (Dec. 6, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 56–57.

243. Bernhardt, *supra* note 21; *see also* BERNHARDT, *supra* note 3, at 52.

244. Res. 0245-2010, N.Y.C. Council (2010); Proposed Res. 245-A, N.Y.C. Council (2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 42–43.

245. *See* Letter from Jobs with Justice to Governor David A. Paterson (Dec. 7, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 19.

246. *See* Letter from Legal Aid Soc'y to Governor David A. Paterson (Dec. 6, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 18.

247. *See* Letter from Make the Road to Governor David A. Paterson (Dec. 3, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 34.

WTPA changes the economic incentives that encourage bad-actor employers to violate the law. . . . These new damages provide just that leverage."[248]

Finally, Governor David A. Paterson issued a strongly worded statement approving the WTPA. Acknowledging concerns businesses and trade associations expressed over the WTPA's record-keeping and notice requirements, he asserted that it was "crucial" to "move forward and carry out the statute's comprehensive and important mandate to protect workers' rights . . . by *deterring* violations and by ensuring that employers who seek to deny those rights are *sanctioned*."[249]

One of the few cases examining the WTPA's legislative history seized upon such language of deterrence as proof of legislative intent to address future violations, not to remedy past ones. In *McLean v. Garage Management Corp.*,[250] Judge Denise L. Cote found "no evidence of legislative intent to apply the 100% liquidated damages amendment retroactively."[251] Instead, Judge Cote observed that "the Sponsor's Memorandum suggests that the legislature intended to increase the NYLL's liquidated damages penalty *to better deter* future violations of the state's labor laws."[252]

### *E. The NYLL's New Prejudgment Interest Provision*

The 2010 Amendment inserted into section 198(1-a) an explicit provision for "prejudgment interest as required under the civil practice law and rules," in addition to liquidated damages.[253] New York's statutory prejudgment interest rate is 9 percent per annum.[254] The WTPA's bill jacket says nothing about this interest provision.[255] Neither do floor debates about the bill.[256] The inclusion of such a provision conjures two alternative interpretations of section 198(1-a)'s liquidated damages. On one hand, NYLL liquidated damages could be punitive in nature and simply supplemented by a compensatory prejudgment interest award designed to compensate employees for delay. On the other hand, the liquidated

248. Letter from Legal Aid Soc'y to Governor David A. Paterson (Dec. 6, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 17–18; *see also* Introducer's Memorandum in Support (June 29, 2010), *reprinted in* N.Y. Bill Jacket 2010, ch. 564, at 8 ("The penalties currently in place for employers paying less than minimum wage are minimal and offer little deterrent.").

249. Governor's Approval Memorandum (emphasis added), *reprinted in* 2010 N.Y. ST. LEGIS. ANN. 431.

250. No. 10 Civ. 3950, 2012 WL 1358739 (S.D.N.Y. Apr. 19, 2012).

251. *Id.* at *9.

252. *Id.* at *10 (emphasis added); *see also supra* note 212 and accompanying text.

253. *See* Wage Theft Prevention Act of 2010, ch. 564, § 7, 2010 N.Y. Laws 1446, 1450.

254. *See* N.Y. C.P.L.R. 5004 (McKinney 2007).

255. *See generally* N.Y. Bill Jacket 2010, ch. 564.

256. *See* N.Y. State Senate, Record of Proceedings 7508–12 (June 30, 2010) (Bill No. 8380); N.Y. State Assembly, Record of Proceedings 22–43 (Nov. 30, 2010) (Bill No. 11726); N.Y. State Assembly, Record of Proceedings 330–37 (July 1, 2010) (Bill No. 10163-B).

damages and the prejudgment interest could both be compensatory. Such a reading would not necessarily render either term superfluous.[257] In the latter scenario, prejudgment interest would guarantee employees a minimum level of compensation should an employer establish the good-faith defense and become excused from paying liquidated damages altogether.

An analogous minimum recovery issue has sparked a split among circuit courts interpreting § 216 of the FLSA. Generally, courts follow *Brooklyn Savings Bank* and prohibit prejudgment interest in § 216 cases where the maximum (100 percent) liquidated damages are awarded.[258] Controversy arises, however, when a court reduces or eliminates liquidated damages pursuant to § 260.[259] Some circuits, including the Second Circuit, have concluded that employers who manage to avoid liquidated damages cannot be assessed prejudgment interest on the back pay awards for which they remain liable.[260] In contrast, the majority of courts have distinguished *Brooklyn Savings Bank* and awarded prejudgment interest when liquidated damages are denied.[261] Where partial liquidated damages are awarded, their relationship to prejudgment interest has been "inadequately explained."[262]

Due to its silence, it is unclear whether the state legislature considered or sought to avoid a similar quandary.

## III. WADING THROUGH THE FLOODWATERS: WHY COURTS SHOULD AWARD ONLY ONE SET OF LIQUIDATED DAMAGES

Whether courts should award both FLSA and NYLL liquidated damages on the same underlying wage should not depend upon efforts to characterize each award as "compensatory" or "punitive," because such an approach presumes that a single clear "purpose" or "nature" can be found. Unfortunately, both the statutory text and the legislative history of section 198(1-a) send conflicting signals, suggesting a mixed purpose. Therefore, courts should recognize that the provisions are nearly identical and serve the same de facto purposes.

257. *See* N.Y. STAT. LAW § 98 (McKinney 1971) ("All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof."); *In re* Yolanda D., 673 N.E.2d 1228, 1230 (N.Y. 1996).

258. 2 KEARNS, *supra* note 8, at 18-166 to -167.

259. 29 U.S.C. § 260 (2006); *see also* 2 KEARNS, *supra* note 8, at 18-164.

260. *See* Addison v. Huron Stevedoring Corp., 204 F.2d 88, 96 (2d Cir. 1953) (agreeing with Landaas v. Canister Co., 188 F.2d 768, 772 (3d Cir. 1951), where the Third Circuit held that there is "no in-between position consisting of unpaid wages plus interest. The claimant gets liquidated damages for delay . . . or he gets nothing."); *see also* 2 KEARNS, *supra* note 8, at 18-164. *But see* Kadden v. VisuaLex, LLC, No. 11 Civ. 4892, 2012 WL 5199369, at *1–2 (S.D.N.Y. Oct. 22, 2012) (awarding prejudgment interest although employer's "good-faith defense" avoided § 216(b) liquidated damages).

261. *See* 2 KEARNS, *supra* note 8, at 18-165 to -166.

262. *Id.* at 18-167; *see also id.* at 18-167 to -169 (discussing the various approaches to prejudgment interest that courts take in partial liquidated damages scenarios).

### *A. The State Statutory Text Does Not Express an Exclusively Compensatory or Punitive Purpose*

The statutory text sheds only a dim light upon legislative intent. First, the state legislature's characterization of the award as a "liquidated damage" indicates a compensatory purpose. The dictionary definition of "liquidated damages" suggests a compensatory function, because such damages compensate for losses that are hard to estimate, calculate, or prove.[263] Nonetheless, the term "liquidated damages" is not always used strictly according to its definition. For example, in *Missel*, *Brooklyn Savings Bank*, *Thurston*, *Schleier*, *Reilly*, and *Carter*, courts required extrinsic aids, like legislative history, to determine the respective purposes of "liquidated damages" provisions.[264] Furthermore, other NYLL provisions specifically employ the term "penalty" instead of "liquidated damages."[265] Such labels, however, do not necessarily govern intent.[266]

Second, the lack of a "willfulness" or another scienter requirement indicates a compensatory purpose or at least the absence of a punitive one. Original interpretations of the 1967 Version as punitive relied upon both the willfulness requirement and the statute's legislative history.[267] Of course, the state legislature removed section 198(1-a)'s willfulness requirement,[268] and the 1967 Version's legislative history is much less clear-cut than courts have presented it to be.[269] While the presence or absence of a willfulness or a similar scienter requirement is not necessarily determinative, it is one of the chief considerations in analyzing the nature of a statutory liquidated damages provision.[270] For example, the Supreme Court cited a willfulness proviso as distinguishing the ADEA's otherwise substantially identical provision from the FLSA's.[271] Likewise, *Carter* decided that the 1967 Version's liquidated damages served as a "penalty" for class-action purposes, because only victims of "willful" violations would receive the additional award—others would recover only their unpaid wages.[272] *Reilly*, following suit, also emphasized the willfulness requirement.[273] Without conditioning section 198(1-a)'s liquidated damages upon culpability,

263. For definitions of "liquidated damages," see *supra* notes 87–88, 107 and accompanying text.

264. For discussions of these cases, see *supra* Parts I.C.2, I.C.3, II.B.

265. *Compare, e.g.*, N.Y. LAB. LAW §§ 197, 198-a, 215, 662 (McKinney Supp. 2013), *with id.* § 198(1-a).

266. *See supra* note 123 and accompanying text.

267. *See supra* Part I.C.3.

268. *See supra* notes 59, 178–80 and accompanying text.

269. *See supra* Parts I.C.3, II.A.

270. *See supra* Parts I.B.4, II.B.

271. *See* Comm'r v. Schleier, 515 U.S. 323, 331–32 (1995) (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)); *see also supra* notes 183–95 and accompanying text.

272. *See* Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116 (App. Div. 1st Dep't 1980), *aff'd*, 419 N.E.2d 1079 (N.Y. 1981).

273. *See* Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d, 253, 265 (2d Cir. 1999) (finding section 198(1-a)'s liquidated damages provision is "to *deter* an employer's *willful* withholding of wages" (emphasis added)).

violations resulting from negligence or even ignorance will trigger liquidated damages.[274] The inclusion of a good-faith defense does not affect this analysis.[275] Because of the amendments, the punishment is no longer restricted to those who are blameworthy, and the deterrent is no longer restricted to those who might consider wrongdoing, so the provision's punitive nature is diminished.

Finally, the prejudgment interest provision does not require section 198(1-a)'s liquidated damages to be punitive, because the provision could be intended to ensure a minimum compensatory recovery, as previously discussed.[276]

### *B. The State Legislative History Does Not Express an Exclusively Compensatory or Punitive Purpose*

Because the text expresses no clear compensatory or punitive purpose, courts should turn to extrinsic materials for evidence of legislative intent.[277] Regrettably, like the text, the legislative history provides no clear answer. Instead, the legislative history sends conflicting signals. As illustrated above in Part II, and as discussed below, some portions emphasize compensating workers and conformity with the FLSA, while others focus on deterring and punishing violations.

First, the 1967 Version's legislative history contains numerous references to compensation.[278] Documents in the bill jacket suggest that the 25 percent liquidated damages the 1967 Version provided to employees were intended to be simultaneously compensatory and punitive in nature.[279] Memoranda from the bill's sponsor, the governor, and the enforcing agency all explicitly stated that the liquidated damages would compensate employees for the consequences of employers' violations.[280] Their unanimous concern over compensation makes sense. Low-wage workers comprise an especially vulnerable demographic, and the impact of withheld wages might be so severe and difficult to prove that ordinary prejudgment interest would not provide sufficient remuneration for their unique injuries.[281] As previously discussed, providing an estimated award that bypasses the need to prove special damages is exactly what "liquidated damages" normally do.[282] Indeed, such concerns underlie the FLSA's liquidated damages provision.[283]

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274. *See supra* note 180 and accompanying text.
275. *See supra* notes 138–40 and accompanying text.
276. *See supra* Part II.E.
277. *See supra* Part I.C.1 (discussing New York statutory construction).
278. *See supra* Part I.C.1.
279. *See supra* Part I.C.1.
280. *See supra* Part II.A.
281. *See supra* notes 22–23, 33, 207, 238 and accompanying text.
282. *See supra* notes 87–88, 107.
283. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707–08, 715–16 (1945); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583–84 (1942); *supra* Part I.C.2.

At the very least, these sources demonstrate that prejudgment interest would duplicate a portion, however small, of the 25 percent liquidated damages, which, when awarded, were intended to compensate employees for the delay in payment. Further, concluding that the 1967 Version contained a compensatory element does not conflict with *Carter*, because *Carter* did not rule out the possibility.[284] The specific question of prejudgment interest was not presented in *Carter*, and *Carter* did not hold that the 1967 Version's liquidated damages are *exclusively* punitive.[285] The Supreme Court has indicated that statutory damages may serve multiple purposes.[286] Thus, to the extent that the 1967 Version's legislative history supports *Reilly*'s interpretation of *Carter* as standing for the proposition that the liquidated damages are *exclusively* "punitive," such an interpretation can only survive in combination with the 1967 Version's willfulness requirement, which no longer exists.[287]

Rather, one of the reasons for amending section 198(1-a) was conformity with the FLSA.[288] Conformity entails bringing the two statutes into agreement with one another. The 2009 Amendment's legislative history shows that interested parties, including the bill's sponsor, contemplated conformity with the FLSA as a goal, not simply a side effect.[289] With conformity as a goal, it would be unlikely that the drafters intended for plaintiffs to receive two sets of liquidated damages. Otherwise, whether or not the state provision "conforms" to its federal counterpart would be irrelevant—a plaintiff could recover under both statutes regardless of conformity. If, however, the legislators intended to provide state protections as an *alternative* to those under federal law, then it seems likely that they would be very much concerned with having the NYLL "conform" to the FLSA, which provides compensatory liquidated damages.[290] Indeed, by removing the willfulness requirement, the legislature eased the employee's evidentiary burdens. This change was remedial, not prophylactic, because employees find themselves in the courtroom only *after* wage and hour violations have already occurred.[291]

It is clear, however, that the 2010 Amendment's primary purposes were deterrence and retribution. Assorted memoranda supporting the bill, including the sponsor's and the governor's, consistently expressed such

284. *See* Carter v. Frito-Lay, Inc., 425 N.Y.S.2d 115, 116–17 (App. Div. 1st Dep't 1980), *aff'd*, 419 N.E.2d 1079 (N.Y. 1981).

285. *See id.*; *supra* Part I.C.3.

286. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); *see also supra* notes 197–202 and accompanying text.

287. *Reilly* specifically states that the purpose of the state's liquidated damages provision is "to deter" a "willful withholding" of wages. Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999).

288. *See supra* Part II.C.

289. *See id.*

290. *See supra* Part I.C.2.

291. One might argue that the burden shift decreases the likelihood that an employer will escape liability for liquidated damages and consequently strengthens deterrence. The 2009 Amendment's legislative history, however, does not support this argument.

sentiments.[292] The WTPA finally upped the ante after New York spent decades under an ineffective enforcement system.[293]

Since the 2010 Amendment increased liquidated damages from 25 percent to 100 percent, it would be reasonable to conclude that the difference is punitive. Dissecting the liquidated damages award, however, would still leave the remaining 25 percent undefined and lead to complicated calculations, essentially defeating the very utility of a "liquidated" award. Permitting the punitive purposes of the increase to overwhelm the mixed purposes of the original award is also unacceptable.[294]

### *C. The Federal and State Liquidated Damages Provisions Overlap*

Neither the statutory text nor the legislative history unambiguously points towards either an exclusively compensatory or punitive purpose. Therefore, courts have a couple of options. First, they could, and should, recognize the fact that both compensatory and punitive considerations shaped the state legislation. Upon doing so, they should award only one set of liquidated damages to avoid duplicating the portion of state liquidated damages, whatever that portion might be, which the legislature deemed appropriate compensation for the harms of wage underpayment. Alternatively, courts confronting demands for both FLSA and NYLL liquidated damages on the same underlying wage could adopt a practical approach, under which they should also award one set of liquidated damages.

Under the current statutory scheme, it does not matter whether section 198(1-a)'s liquidated damages are exclusively compensatory, punitive, or both. First, if the NYLL's liquidated damages are exclusively compensatory, the double recovery doctrine obviously would prohibit combining them with the FLSA's liquidated damages. Similarly, if the NYLL's liquidated damages are both compensatory and punitive, then combining them with the FLSA's liquidated damages would duplicate the compensatory aspect of the state award. Finally, even if the NYLL's liquidated damages are exclusively punitive, the double recovery doctrine would still prohibit their combination with the FLSA's, because the NYLL already provides plaintiffs a compensatory remedy for delay in the form of prejudgment interest.[295] Prejudgment interest is a compensatory award for the delayed use of money.[296] Thus, awards under both the FLSA and the NYLL would overlap, because the FLSA's liquidated damages are designed

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292. *See supra* Part II.D.

293. *See id.*

294. *See* N.Y. STAT. LAW § 192 (McKinney 1971) ("An amendatory act and the original statute are to be construed together, and the original act and the amendments are viewed as one law passed at the same time.").

295. *See* N.Y. LAB. LAW § 198(1-a) (McKinney Supp. 2013); *see also* N.Y. C.P.L.R. 5004 (McKinney 2007).

296. *See supra* notes 80–86 and accompanying text (discussing the compensatory nature of prejudgment interest).

to compensate employees for a host of injuries associated with untimely payments, including the delayed use of money.[297] Employees cannot receive duplicative awards for delay. Accordingly, courts should award only NYLL damages, because they provide a greater payout.[298]

Dodging the question of "purpose" or "nature" in this manner might provide only temporary reprieve, as the legislature could remove the NYLL's prejudgment interest provision. Further, it would certainly be ironic if adding state prejudgment interest to state liquidated damages, for a minimum of 109 percent of unpaid wages, prevented the combination of FLSA and NYLL liquidated damages, which would amount to 200 percent of unpaid wages. Indeed, 100 percent plus interest will almost always be less than the 125 percent combined award, which some courts had awarded under the 1967 Version.[299]

If determining the purpose or nature of section 198(1-a) remains a relevant objective, it is important to remember that, despite all of the saber rattling about cracking down on "wage theft," the 2010 Amendment merely put section 198(1-a) on par with its federal counterpart. Although the 2010 Amendment took a giant leap forward by quadrupling state liquidated damages, employers had already faced the threat of 100 percent liquidated damages under the FLSA for over seventy years, and the state's failure to enact stronger provisions illustrates a reluctance to "get tough."[300]

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297. *See supra* Part I.C.2.

298. In addition to the underpaid wages, the NYLL awards an additional 100 percent as liquidated damages plus prejudgment interest at the rate of 9 percent per annum. *See* N.Y. LAB. LAW § 198(1-a) (authorizing 100 percent liquidated damages plus prejudgment interest); N.Y. C.P.L.R. 5004 (specifying prejudgment interest rate of 9 percent per annum). In contrast, the FLSA awards only an additional 100 percent as liquidated damages. *See* 29 U.S.C. § 216 (authorizing 100 percent liquidated damages); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715–16 (1945) (prohibiting the combination of prejudgment interest and § 216 liquidated damages); *see also* 29 U.S.C. § 218 (governing the FLSA's relation to other laws).

299. *See* N.Y. LAB. LAW § 198(1-a); N.Y. C.P.L.R. 5004; *see also supra* notes 162–63 and accompanying text (discussing the intracircuit split regarding interpretations of the 1967 Version). Under the NYLL, liquidated damages plus interest would amount to 109 percent of unpaid wages one year overdue, 118 percent of those two years overdue, and 127 percent of those three years overdue. *See* N.Y. LAB. LAW § 198(1-a); N.Y. C.P.L.R. 5004; *see also supra* notes 64–65 and accompanying text (explaining that the federal and state statutes overlap for a maximum of three years due to the applicable limitations periods).

300. *Compare* 29 U.S.C. § 216 (2006), *with* N.Y. LAB. LAW § 198(1-a); *see also supra* Part I.A.1 (discussing the FLSA's enactment in 1938). A number of other states award 200 percent liquidated damages. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-355 (2012) ("[T]he employee may recover in a civil action against an employer or former employer an amount that is treble the amount of the unpaid wages."); MASS. ANN. LAWS ch. 149, § 150 (LexisNexis 2008) (authorizing "treble damages, as liquidated damages, for any lost wages and other benefits"). New York's legislature considered but did not adopt a similar provision. In July 2010, the New York State Assembly passed a 200 percent liquidated damages provision in its version of the WTPA. *See* Assemb. B. 10163-B, § 8, 233d Sess. (N.Y. 2010). Subsequently, however, the Assembly abandoned that provision in favor of a 100 percent liquidated damages provision when it adopted the New York State Senate's version of the WTPA instead. *See* Assemb. B. 11726, § 7, 233d Sess. (N.Y. 2010) (same as S.B. 8380, 233d Sess. (N.Y. 2010)); *see also* N.Y. State Assembly, Record of Proceedings

Since the state legislature was aware of the existing federal scheme, another relevant question is whether it intended to provide an additional or alternative award. Through the NYLL, the state legislature has constructed a comprehensive statutory scheme that both compensates victims when wage underpayment occurs and punishes and deters violators.[301] In addition to liquidated damages, its myriad other mechanisms for punishment and deterrence include the specter of large civil penalties, criminal fines, and even imprisonment.[302] Liquidated damages differ because they impact employees' pockets, not the state's. Therefore, like the FLSA, the NYLL incentivizes private enforcement, saving the government money.[303]

The parallels between the state and federal schemes support the conclusion that the NYLL's liquidated damages are an alternative to the FLSA's. As a deterrent, section 198(1-a)'s provisions are no more persuasive than the FLSA's, and as a punishment, they are no more painful.[304] Both statutes address the same harm, provide employees the same remedy, and grant employers essentially the same defense.[305] Without compelling contrary evidence, awarding liquidated damages under both statutes on the same underlying wage constitutes a double recovery that courts should avoid.

## CONCLUSION

Courts facing demands for liquidated damages under both the FLSA and the NYLL should not award them under both statutes. In light of the conflicting textual and historical evidence, a dichotomous approach or a "judgment call" choosing one purpose over the other would disregard the fact that both compensatory and punitive considerations shaped the state legislation. NYLL liquidated damages should be recognized for what they are—both compensatory and punitive in nature. Consequently, courts can only avoid double recovery by awarding liquidated damages under one statute.

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23–24 (Nov. 30, 2010) (Bill No. 11726) (remarks of Assemb. Carl E. Heastie) (explaining that the Senate's version provided lower liquidated damages than Assembly's version).

301. *See* Governor's Approval Memorandum, *reprinted in* 2010 N.Y. ST. LEGIS. ANN. 431 (describing the WTPA as "comprehensive and expansive"); Gottlieb v. Kenneth D. Laub & Co., 626 N.E.2d 29, 33 (N.Y. 1993) (observing that the 1967 Version provides "cumulative remedies for wage claims brought thereunder").

302. *See, e.g.*, N.Y. LAB. LAW §§ 197, 198, 198-a, 215, 662, 663.

303. *See supra* notes 93, 103 and accompanying text.

304. New York's prohibition of class recovery further dulls the pain of § 198(1-a)'s liquidated damages. *See* Governor's Approval Memorandum, *reprinted in* 2010 N.Y. ST. LEGIS. ANN. 428–31 (explaining that provisions that would have removed N.Y. C.P.L.R 901(b)'s prohibition on class recovery were removed from the WTPA); *see also supra* note 98 and accompanying text (briefly discussing N.Y. C.P.L.R 901(b)). On the other hand, New York has a longer statute of limitations than the FLSA does. *See supra* notes 64–65 and accompanying text.

305. *Compare* 29 U.S.C. §§ 216, 260, *with* N.Y. LAB. LAW § 198(1-a).